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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 790

JAMES C. COLGATE, APPELLANT,

vs.

ERWIN M. HARVEY, TAX COMMISSIONER OF THE STATE OF VERMONT

APPEAL FROM THE SUPREME COURT OF THE STATE OF VERMONT

FILED MARCH 18, 1935.

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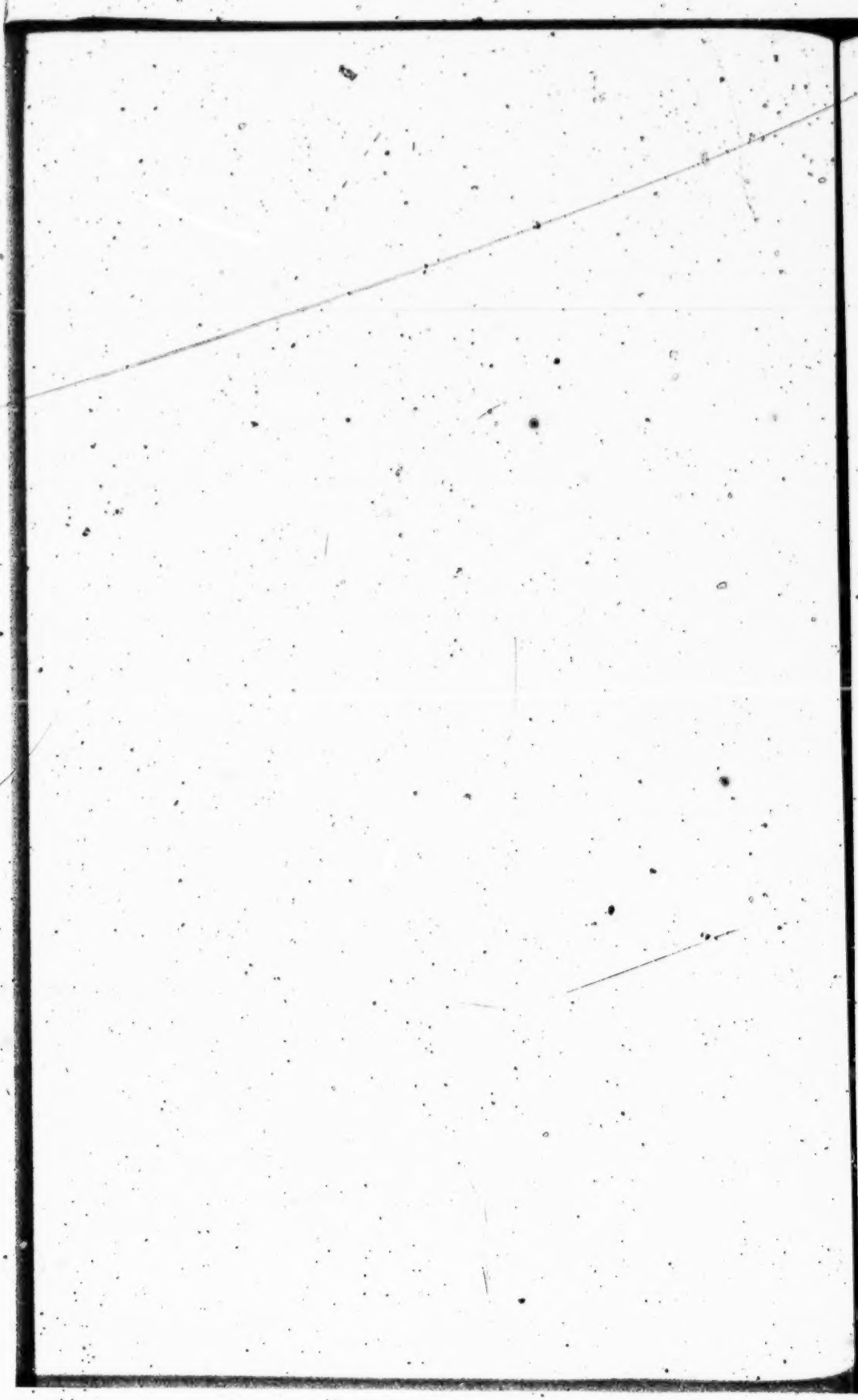

[fols. a-2 & 3]

IN SUPREME COURT OF VERMONT

DOCKET ENTRIES

WASHINGTON COUNTY

1618

JAMES C. COLGATE

v.

ERWIN M. HARVEY, Com'r

T&H A. G., Page, Seymour Edgerton

Mar. T. 1933. Pet. fi. Mar. 2, 1933; agreed state. of facts fi. June 2; heard in vacation after the Mar. T. '33; with Ct., judgt. ord. fi. Feb. 15, '34; plt'fs except'ns to judgt. fi. Feb. 15; plt'fs bill of excep. fi. Feb. 15. Heard (in Sup. Ct.) June 5 (1934), Powers, C. J. Nov. T. 34. Judgt. affd. Nov. 7, Pet. for allowance of appeal fi., Ord. allow. appeal fi., Assign. Errors fi., State. under rule 12 of rules of Sup. Ct. U. S. fi., Notice of appeal and notice under rule 12 fi., Citation and Officer's return of service fi., Costs Bond fi. Feb. 5, 1935; Praecipe fi. Feb. 20, 1935.

[fol. 4] IN COUNTY COURT OF WASHINGTON COUNTY

In Vacation

JAMES C. COLGATE

vs.

ERWIN M. HARVEY, Tax Commissioner

PLAINTIFF'S BILL OF EXCEPTIONS

February 15, 1934.

Petition brought to the County Court within and for the county of Washington, under and pursuant to the pro-

visions of section 27, of Part I, of the Income and Franchise Tax Act of 1931; heard by said Court, Bicknell, J., presiding, on agreed statement of facts and arguments of counsel, in vacation after March Term 1933, and with the Court; judgment, February 15, 1934, that the defendant recover his costs; exceptions by plaintiff.

At the trial the plaintiff presented, and there arose, certain questions of law, each and every of which the Court determined and ruled against the plaintiff. Said questions of law are, and are presented by, each and every of the claims made by the plaintiff in paragraphs 5A; 5B; 7A(1); 7A(2); 7B(1); 7B(2); 9A; 9B and 11 of his application to the defendant, dated August 27, 1932, marked Exhibit C, and attached to and forming a part of his said petition, which is hereby referred to and made a part of this bill of exceptions to show said questions of law; and also certain other questions of law, to wit: (1) that the tax on said dividends of corporations not doing business in Vermont, as to business done outside Vermont, was tantamount to a tax on the securities of said corporations, which said securities were not taxable in Vermont because having their business situs outside Vermont and thus coming under the principle governing the taxation of said securities as tangible per- [fols. 5 & 6] sonalty having its situs outside Vermont; (2) that by so penalizing or discouraging the investment in corporate business carried on outside Vermont, the tax operates as an unlawful interference with interstate commerce through placing a virtual embargo on the exportation of Vermont capital, an important factor of interstate commerce, contrary to section 8 of Article I of the United States Constitution. To said determinations and rulings as to said questions of law, and each of them, the plaintiff was allowed exceptions respectively.

The plaintiff filed his exceptions to said judgment, and each and every of said exceptions was overruled by said Court, to which respectively the plaintiff was allowed exceptions.

Said petition, including all papers therein referred to, attached thereto and therein made a part thereof, said agreed statement of facts, and said exceptions to judgment are hereby referred to and made a part of this bill of exceptions for a review and final decision of said questions of law by the Supreme Court.

Exceptions allowed, subject to amendment within thirty days from the date hereof, execution stayed, and cause and said questions of law passed to the Supreme Court.

Bicknell, J. having deceased, this bill of exceptions is allowed by me pursuant to the provisions of section 2071 of the Public Laws.

Given under my hand this 15th day of February, 1934.

(Signed) John S. Buttles, Superior Judge.

[fol. 7] In County Court of Washington County

[Title omitted]

Petition.

To the County Court, within and for the County of Washington and State of Vermont, next to be held at Montpelier, within and for the said County of Washington on the second Tuesday of March, A. D. 1933, comes your petitioner, James C. Colgate, of Bennington, in the County of Bennington and State of Vermont, by George L. Hunt, his attorney, and brings this petition under and in accordance with the provisions of section 27 of Part I of No. 17 of the Acts of 1931, known as the Income and Franchise Tax Act of 1931, and thereupon complains and says:

1. On March 10, 1932, your petitioner made his return under said Act for the calendar year 1931 to the petitionee as Tax Commissioner for the State of Vermont, copy of which said return is hereto attached and made a part hereof and marked "Exhibit A" and accompanied his said return by his protest in writing against the requirement of such return and the imposition and collection of such tax, a copy of which said protest is hereto attached and made a part hereof and marked "Exhibit B".

2. Thereafterwards, on August 27, 1932, under and in accordance with the provisions of section 26 of said Act, your petitioner applied to the petitionee as such Tax Commissioner for a revision of the tax assessed against him, in accordance with said return, a copy of which said applica-
[fol. 8] tion is hereto attached and made a part hereof and marked "Exhibit C".

3. Thereafterwards, by leave of said petitionee as such Tax Commissioner, your petitioner, as such applicant, amended his said application as appears by such amendment, a copy of which said amendment is hereto attached and made a part hereof and marked "Exhibit D".

4. Thereafterwards, on February 28, 1933, after hearing on said application as amended, the petitionee, as such Tax Commissioner, made his order thereon, a copy of which said order is hereto attached and made a part hereof and marked "Exhibit E".

5. Your petitioner, to avoid prolixity and repetition, instead of averring herein the allegations of said application as amended, in the words and figures as therein set forth, hereby alleges and avers each and every of the facts and points of law set forth in said application as amended, and for this special purpose hereby refers to said application and said amendment thereto and makes the same a part hereof with all and the same force and effect as though repeated herein.

Wherefore, your petitioner prays that, upon appropriate proceedings being had, your petitioner may be granted the relief, if any, to which he may be found entitled, and that any taxes, interest or penalties paid, and found by your Honorable Court to be illegally assessed, shall be ordered refunded to your Petitioner with interest at six percent per annum from the time of payment, with costs, and that judgment may be entered herein accordingly, all pursuant to the statute in such case made and provided.

[fol. 9] Dated this 1st day of March, 1933.

James C. Colgate, by George L. Hunt, His Attorney.

George L. Hunt recognized to the petitionee, in the sum of fifty dollars, as surety for costs of prosecution, as the law directs.

Before me,

Joseph G. Frattini, County Clerk.

[fol. 10] SUMMONS

STATE OF VERMONT,
Washington County, *ss:*

To any Sheriff or Constable in the State, Greeting:

By authority of the State of Vermont, you are hereby commanded to summon Erwin M. Harvey, of Montpelier, in the County of Washington and State of Vermont, Tax Commissioner, to appear before the County Court next to be held at Montpelier, within and for the county of Washington, on the second Tuesday of March, A. D. 1933, then and there to make answer to the foregoing petition of James C. Colgate, and show cause, if any he have, why the prayer thereof should not be granted.

Fail not, but serve and return according to law.

Dated at Montpelier, in the County of Washington, this 1st day of March, A. D. 1933.

Joseph G. Frattini, County Clerk.

(Here follows photolithograph, side folio 11.)

Exhibit A to Petition

Form No. 109

One quarter of total tax must accompany return. Balance in three equal installments due in three, six and nine months after the return is due. The whole tax may be paid in one payment which may be sent with return.

Auditor's Stamp

STATE OF VERMONT
INDIVIDUAL INCOME TAX RETURN
For Calendar Year 1931

or Fiscal Year ending ..... 193....

File this return with Commissioner of Taxes, Montpelier, Vt., not later than March 15th or 15th of Third Month after end of Income Year.

Do Not Write in this Space
Date Received

File Code
Serial Number
Cashier's Stamp

The Commissioner will not notify you of due date for installments if you elect to so pay your tax. Failure to receive a due installment on or before its due date will automatically result in application of the penalty provided by statute.

PRINT NAME AND ADDRESS PLAINLY BELOW

JAMES C. COLGATE
NAME

Street and number or rural delivery

Bennington — Post Office; Bennington — County; Vermont — State

Occupation Stockbroker

Cash Ck. M. O.
First Payment

Amount

1. Are you a resident of the State of Vermont? Yes
2. Is this a joint return of husband and wife? No
3. State name of husband or wife if a separate return was made HOPE H. COLGATE
4. Were you married and living with husband or wife on the last day of your taxable year? Yes
5. If not were you on the last day of your taxable year supporting in your household one or more persons closely related to you? --
6. If your status in respect to questions 4 and 5 changed during the year, state date and nature of change --
7. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support were receiving their chief support from you on the last day of your taxable year? --

Item and Instruction No.	CLASS A—BUSINESS INCOME From whom received	Amount Received	Expenses Paid (Explain in Schedule E)	
1.	Salaries, Wages, Fees, Commissions, etc.			
	International Minerals & Metal Corp.	11,985.00		11,985. 00
	Various Directors Fees	3,270.00		3,270. 00
2.	Income from Business and Professions (Schedule A)			
3.	Business Income from Partnerships (State name and address)			
	Jas. B. Colgate & Co. 44 Wall St., New York, N. Y.	Loss		(21,150. 39
4.	Business Income from Fiduciaries (State name and address)			
5.	Rents and Royalties (Schedule B)			9,082. 22
6.	Other Income (State Nature of Income)			
7.	Total Income in Items 1 to 6			3,186. 83
	DEDUCTIONS FROM CLASS A			
8.	Interest Paid (Not included in Schedule A)		65,055. 62	
9.	Taxes Paid on Business Property (Not included in Schedules A and B) (Schedule C)			
10.	Losses by Fire or Storm on Business Property (Not included in Schedules A and B.) (Schedule D)			
11.	Bad Debts incurred in Business (Not compensated for by Insurance) (Schedule E)			
12.	Contributions (Schedule E)			
13.	Other Deductions Expenses (Schedule E)		5,022. 16	
14.	Total Deductions in Items 8 to 13			70,077. 78
15.	Net Income Class A (Item 7 minus Item 14)	Loss		(66,890. 95)
	CLASS B—INTANGIBLE INCOME			
16.	Interest on Notes, Mortgages, Bonds, etc. (Schedule G)			47,872. 77
17.	Taxable Dividends of Vermont Corporations (Schedule H)			
18.	Taxable Dividends of Other Corporations (Schedule I)			131,530. 39
19.	Intangible Income from Fiduciaries and Partnerships (State name and address)			
20.	Taxable Income from Annuities (Schedule J)			
21.	Total Class B Income in Items 16 to 20 (No Deductions)			179,403. 16
	COMPUTATION OF TAX			
22.	Net Income Class A (Item 15)			Loss
23.	Personal Exemption and Credit for Dependents			
24.	Taxable Income Class A (Item 22 minus Item 23)			
25.	Income Class B (Item 21)			179,403. 16
26.	Personal Exemption (Not allowed if in receipt of ANY Class A income)			
27.	Taxable Income Class B (Item 25 minus Item 26)			179,403. 16
28.	Class A Tax (2% of Item 24)			
29.	Class B Tax (4% of Item 27)			7,176. 13
30.	Total Tax (Items 28 and 29)	See annexed protest		7,176. 13

RETURNS CANNOT BE ACCEPTED AS COMPLETE UNLESS EVERY ITEM IS ANSWERED WITH FIGURES OR WITH THE WORD "NONE"

AFFIDAVIT

I swear (or affirm) that this return has been examined by me, and, to the best of my knowledge and belief, is a true and complete return for the taxable year as stated, pursuant to No. 17 of the Acts of 1931 and Regulations issued under authority thereof.

If return is made by agent, the reason therefore must be stated on this line

Subscribed and sworn to before me this 10th day of March, 1932.

Jas. C. Colgate
Signature of taxpayer or agent

Address of agent

Morris Cohen — Signature of officer administering oath

Notary Public — Title

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V9

SCHEDULE A—INCOME FROM BUSINESS OR PROFESSION

1. Total receipts from business or profession (state kind of business) _____ $ _____

Cost of Goods Sold

2. Labor	$	
3. Material and supplies		
4. Merchandise bought for sale		
5. Other costs (Itemized below or on separate sheet)		
6. Plus inventory at beginning of year		
7. Total (Lines 2 to 6)	$	
8. Less inventory at end of year		
9. Net Cost of Goods Sold (Line 7 minus line 8)	$	

Enter "C," or "C or M," on Lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

Other Business Deductions

10. Salaries not included as "Labor," in line 2 (Do not deduct compensation for your services)	$	
11. Interest on business indebtedness to others		
12. Taxes on business and business property		
13. Losses (Explain in Schedule D)		
14. Bad debts arising from sales or services		
15. Depreciation, obsolescence, and depletion (Explain in table provided at foot of page)		
16. Rent, repairs, and other expenses (Itemized below or on separate sheet)		
17. Total (Lines 10 to 16)	$	
18. Total Deductions (Line 9 plus line 17)		$
19. Net Profit (Line 1 minus line 18) (Enter as Item 2 on Page 1)		$

Explanation of deductions claimed on Lines 5 and 16 _____

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES

1. Kind of Property	2. Amount Received	3. Cost	4. Value as of Jan. 1, 1931	5. Depreciation (Schedule K)	6. Repairs	7. Other Expenses (Itemize)	8. Net Profit
41-43 John St. N.Y.C.	$ 20,000.04		$	$ 250	$	$ 8963.89	$ 10,786.15
Colby Homestead, New London, N.H.	1,814.80					3518.73	(1,703.93
	21,814.84			250		12,482.62	9,082.22

Explanation of deduction claimed in column 7 Interest on mtgs., taxes, agents, commissions Insurance; etc.

SCHEDULE C—TAXES ON BUSINESS PROPERTY

	$

SCHEDULE D— Losses by Fire or Storm on Business Property not compensated for by Insurance

	$

SCHEDULE E—EXPLANATION OF DEDUCTIONS IN ITEMS 1-11-12-13

	$
Item 13-Business expenses	
Salaries	3,000.00
Legal fees	2,022.16
Total	5,022.16

SCHEDULE F—NON-TAXABLE INCOME

	$		$
Interest on Federal Obligations		Interest on Money loaned in Vt. at 5% or less	
Interest on Vt. State and Municipal Bonds		Interest on Deposits in Vt. Banks	
Dividends from Vt. Corporations			

SCHEDULE G—INTEREST on NOTES, MORTGAGES, BONDS, Etc.

All from sources outside Vermont	47,872.77

SCHEDULE H—TAXABLE DIVIDENDS VT. CORPORATIONS

	$

SCHEDULE I—DIVIDENDS of CORPORATIONS out of VERMONT

First Natl Bank, Bennington, Vt.	$ 160.00
County " " " "	495.00
Socony-Vacuum Oil Co.	14,500.00
Other corps. not doing business in Vermont	116,375.39
	131,530.39

SCHEDULE J—TAXABLE INCOME FROM ANNUITIES

	$

SCHEDULE K—EXPLANATION OF DEDUCTION CLAIMED IN SCHEDULES A AND B

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Age When Acquired	4. Probable Life After Acquirement	5. Cost (Exclusive of Land)	6. Value as of Jan. 1, 1931 (Exclusive of Land)	Amount of Depreciation Charged Off 7. Previous Years	8. This Year
Brick Bldg.-John St. New York City	1904-23	old	--	$ 8,353.33	$ --	$ 250.00 per year	$ 250.00

Attach a separate sheet if any of the above schedules do not provide sufficient space

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[fol. 12] EXHIBIT "B" TO PETITION

James C. Colgate, renders herewith the annexed Individual Income Tax Return for the Calendar Year 1931, upon the form prescribed by the State of Vermont, and pays ¼ of the tax indicated thereby, for the purpose, and only for the purpose, of avoiding the penalties provided for the failure to do so, and protests against the requirement of such return and the imposition and collection of such tax upon the grounds, among others,

that the Vermont Income and Franchise Tax Acts of 1931 is unconstitutional and void in whole and in part under Article I, Sec. 8, Article IV, Sec. 2 and Amendment XIV of the Constitution of the United States and Article 9th of the Constitution of the State of Vermont, since it would, if enforced, inerfere with interstate and foreign commerce, deprive persons of the privileges and immunities of the citizens of the several states, deprive them of their property without due process of law and deprive them of the equal protection of the laws, and that said Vermont Income and Franchise Tax Act is misconstrued by the form of return prescribed by the State of Vermont, and that the tax indicated by said Return is therefore incorrect in the following particulars, among others:

No tax at all is due since Part I of said Act is wholly void. Class B income should be reduced by (a) $65,055.62, the interest paid in the course of earning Class B. income, (b) $7,819.55, a bad debt actually ascertained and charged off during the year, (c) $50,823.63, contributions made to charities during the year (or so much thereof as does not exceed 15% of the Class B income computed without the [fol. 13] benefit of such deduction), (d) $131,530.39, dividends on corporations other than Vermont corporations, (e) $47,872.77 interest earned on account of money loaned without the State of Vermont, and (f) $800 exemption for a married individual living with his wife.

Nothing herein contained shall be deemed to preclude the undersigned from urging other grounds of objection to said Act or any part thereof or from urging a different treatment of the above or othe items in the computation of the tax, if any.

Dated: March 10, 1932.

Jas. C. Colgate.

[fol. 14] EXHIBIT "C" TO PETITION

Before the Commissioner of State Taxes.

JAMES C. COLGATE

vs.

STATE OF VERMONT

Application

To the Commissioner of State Taxes of the State of Vermont:

Comes James C. Colgate, of Bennington, in the County of Bennington and State of Vermont, and respectfully represents:

1. That the said James C. Colgate was born at Yonkers, New York, in the United States of America and is a citizen of the United States and of the State of Vermont. That the said James C. Colgate, as a taxpayer within the provisions of No. 17 of the Acts of 1931, known as the Income and Franchise Tax Act of 1931, heretofore, to wit, on the 10th day of March, 1932, made his return thereunder for the calendar year 1931 to said Commissioner, accompanied by his protest in writing against the requirement of such return and the imposition and collection of such tax; and said return and protest, on file with said Commissioner, are hereby referred to and made a part hereof.

2. That thereafterwards there was assessed against said taxpayer in accordance with said return, a tax in the sum of $7,176.13 of which he has paid the sum of $3,588.07 being the first two quarters of the total tax so assessed.

3. That said tax was a Class B tax, so-called, being four percent. of $179,403.16, which said sum was made up of $131,530.39 as taxable dividends of corporations, and $47,872.77 as interest on notes, mortgages, bonds, etc.

4. That of said sum of dividends of corporations $131,530.39 only $655.00 was dividends of Vermont corpora-
[fol. 15] tions, the remainder of $130,875.39 being dividends of corporations doing business outside of the State of Vermont and as to such business.

5. Said tax was unlawfully assessed and collected and is void, for that:

A. Said taxpayer's natural, inherent and unalienable rights of acquiring, possessing and protecting property, guaranteed to him by Article 1st of the Declaration of Rights of the Vermont Constitution, and the declaration that government is, or ought to be, instituted not for the particular emolument or advantage of any who are a part only of the community, by Article 7th of said Declaration of Rights, have been abridged, infringed and violated by the provisions of said Act, in that said law, as respects the taxation and exemption of income by dividends on stocks of corporation, by the operation of the exemption of Section 3, Second, (d) penalizes and discriminates against him for owning, and deriving such income from stocks of corporations, whether domestic or foreign, that are "doing business" outside of the State of Vermont, such penalty and discrimination being measured by the extent of the business of the corporation done without the State of Vermont.

B. Said taxpayer's privileges and immunities as a citizen of the United States and a citizen of the State of Vermont have been abridged, and he has been deprived of his property without due process of law, and he has been denied the equal protection of the laws, in violation of the provisions of the Constitution of the United States, by said Act, which classifies his income from stocks of corporations so as to impose a greater burden upon his acquisition, possession and enjoyment of stocks of corporations which do all or part of their business outside the State of Vermont, than is imposed upon his acquisition, possession and [fol. 16] enjoyment of stocks of corporations which do all or a larger part of their business in the State of Vermont.

6. That of said sum of $47,872.77 as such interest, the whole amount was interest on money loaned outside the State of Vermont, but $25,945.00 was interest on such loans bearing interest at a rate not exceeding five per cent per annum.

7. Such tax was unlawfully assessed and collected and is void, for that:

A. Said Taxpayer's natural, inherent and unalienable rights of acquiring, possessing and protecting property,

guaranteed to him by Article 1st of the Declaration of Rights of the Vermont Constitution, and the declaration that government is, or ought to be, instituted not for the particular emolument or advantage of any who are a part only of the community, by Article 7th of said Declaration of Rights, have been abridged, infringed and violated by the provisions of said Act, in that said Law, as respects the taxation and exemption of income by interest on account of money loaned, by the operation of Section 3, Second, (a):

(1) Imposes a tax upon interest received on money loaned outside the State of Vermont at not exceeding five percent per annum evidenced by a promissory note, mortgage on real estate or bond for a deed, including credit representing the purchase price or any part thereof of real estate within the State of Vermont, sold or transferred, evidenced by a promissory note, mortgage on real estate or bond for a deed, bearing interest at said rate, and imposes no tax in case of such a loan of money at the same rate of interest within the State of Vermont.

(2) Imposes such a tax on interest on money not so [fol. 17] loaned either within or without the State of Vermont when the rate of interest exceeds five per cent per annum.

B. Said taxpayer's privileges and immunities as a citizen of the United States and a citizen of the State of Vermont have been abridged, and he has been deprived of his property without due process of law, and he has been denied the equal protection of the laws, in violation of the provisions of the Constitution of the United States, by said Act, which:

(1) Imposes a tax upon interest received on money loaned outside the State of Vermont at not exceeding five per cent per annum evidenced by a promissory note, mortgage on real estate or bond for a deed, including credit representing the purchase price or any part thereof of real estate within the State of Vermont, sold or transferred, evidenced by a promissory note, mortgage on real estate or bond for a deed, bearing interest at said rate, and imposes no tax in case of such a loan of money at the same rate of interest within the State of Vermont.

(2) Imposes such a tax on interest on money not so loaned either within or without the State of Vermont when the rate of interest exceeds five percent per annum.

8. That said tax was computed without the benefit of a personal exemption of $800.00 to which said taxpayer would have been entitled as a married individual living with his wife but for the fact that he received during said year an amount of Class A. income, so-called.

9. Such tax was unlawfully assessed and collected and is void, for that:

A. Said taxpayer's natural, inherent and unalienable [fol. 18] rights of acquiring, possessing and protecting property, guaranteed to him by Article 1st of the Declaration of Rights of the Vermont Constitution, and the declaration that government is, or ought to be, instituted not for the particular emolument or advantage of any who are a part only of the community by Article 7th of said Declaration of Rights, have been abridged, infringed and violated by the provisions of said Act, in that said law, as respects the taxation and exemption of Class B. income so-called, allows an exemption of $800.00 in the case of a married individual living with his wife only where the taxpayer has no Class A. income, so-called, by the operation of the exemption of Section 3, Second (e).

B. Said taxpayer's privileges and immunities as a citizen of the United States and a citizen of the State of Vermont have been abridged, and he has been deprived of his property without due process of law, and he has been denied the equal protection of the laws, in violation of the provisions of the Constitution of the United States, by said Act, which as respects the taxation and exemption of Class B. income, so-called, allows an exemption of $800.00 in the case of a married individual living with his wife only where the taxpayer has no Class A. income, so-called.

10. That said taxpayer during said year received Class A. income, so-called, in the sum of $3,186.83 which was more than offset by deductions thereform, so-called, in the amount of $70,077.78, all of which was interest or expenses paid by said taxpayer which said interest and expenses were so paid in the course of, and as a means of, earning

the Class B income, so-called, and that said taxpayer dur-
[fol. 19] ing said year had other items properly deductible but which were not reported on the face of the return since the reporting thereof would have been either uncalled for or ineffective under the terms of the official form, to wit, (a) $2,000.00 of Class A. income, so-called, as a personal exemption to which said taxpayer was entitled as a married individual living with his wife, (b) $800.00 of Class B. income, so-called, as a personal exemption to which said taxpayer was entitled as a married individual living with his wife, (c) $7,819.55 as a debt actually ascertained to be worthless and charged off during said year; and (d) a part of $50,823.63 as contributions within said year to organizations operated exclusively for religious, charitable or educational purposes.

11. That if, notwithstanding the contentions in paragraphs 5, 6, 7, 8 and 9 above set forth, any tax was due from said taxpayer, there should be applied against Class A. income, so-called, an exemption of $2,000.00 as aforesaid, and a portion of said sum of $50,823.63 contributions limited to 15% of said Class A income as computed without the benefit of the application of any part of such contributions, and there should be applied against Class B income, so-called, an exemption of $800.00 as aforesaid, and a portion of said sum of $50,823.63 contributions limited to 15% of said Class B income as computed without the benefit of the application of any part of such contributions, and there should be applied against Class A income or Class B income or both, said $7,819.55 worthless debt, and said $70,077.78 interest and expenses, which two said sums the taxpayer elects to have applied against said Class B. income, so-called.

Wherefore, the said taxpayer hereby applies to said Commissioner for revision of the tax so assessed against
[fol. 20] him, pursuant to the statute in such case made and provided.

Dated this 27th day of August, 1932.

Jas. C. Colgate. George L. Hunt, Attorney for Applicant. E. J. Dimock, Of Counsel.

[fol. 21] EXHIBIT "D" TO PETITION

Before the Commissioner of State Taxes

JAMES C. COLGATE

vs.

STATE OF VERMONT

Amendment of Application

Now comes James C. Colgate, applicant in the above matter, by George L. Hunt, his attorney, and amends said application by adding to Paragraph 4 thereof the following:

except that as to $14,500 of said dividends, received by said taxpayer from the Socony-Vacuum Oil Company, as shown by said return, said taxpayer is informed and believes that .23 of 1% of the income of said Socony-Vacuum Oil Company for the year 1931 was derived from business done within the State of Vermont.

James C. Colgate, by George L. Hunt, His Attorney.

[fols.22 & 23] EXHIBIT "E" TO PETITION

Tax Department, Income Tax Division

In re JAMES C. COLGATE

Order on Revision of Assessment

The above named taxpayer having made application for revision of his income tax for the year 1931, under the provisions of Sec. 26 of Part 1 of No. 17 of the Acts of 1931 on hearing thereon the taxpayer appearing by his attorneys, Theriault & Hunt, it is determined by the Commissioner that the tax assessed to wit, the sum of $7,176.13, as shown by the return filed, is not excessive and is correct and such tax is resettled and computed at said sum of $7,176.13.

Done at Montpelier in the county of Washington and State of Vermont, this 28th day of February, A. D., 1933.

Erwin M. Harvey, Commissioner of Taxes.

A true copy.—Attest.

Erwin M. Harvey, Commissioner.

[fols. 24 & 25] In County Court of Washington County

[Title omitted]

Agreed Statement of Facts

In the above-entitled cause it is hereby agreed by and between the parties, by their respective counsel, that the facts in said cause are as follows, to wit:

1. The facts set forth in the petition, including the facts set forth in paragraphs 1, 2, 3, 4, (as amended by the amendment thereto attached to and made a part of said petition and marked Exhibit D) 6, 8, and 10 of the petitioner's application to the Commissioner of State Taxes, dated August 27, 1932, attached to and made a part of said petition and marked Exhibit C.

2. The petitioner has hitherto paid the full amount of the tax of $7,176.13, mentioned in paragraph 2 of said application, under protest.

Dated this 31st day of May, 1933.

James C. Colgate, by George L. Hunt, His Attorney.
Erwin M. Harvey, Tax Commissioner, by Lawrence C. Jones, Attorney General.

]fols. 26 & 27[In County Court of Washington County

In Vacation

[Title omitted]

Judgment Order

February 15, 1934

Judgment, on agreed statement of facts, referred to on file, that the defendant recover his costs.

Given under our hands this 15th day of February, 1934.

(Signed) Lewis D. Coburn, Geo. M. Stewart, Judges of Washington County Court.

[fol. 28] IN COUNTY COURT OF WASHINGTON COUNTY

In Vacation

[Title omitted]

PLAINTIFF'S EXCEPTIONS TO JUDGMENT

February 15, 1934

Now comes the plaintiff in the above-entitled cause, by Theriault & Hunt, his attorneys, and excepts to the judgment rendered therein, that the defendant recover his costs, on the following grounds:

1. That the facts as agreed to in the agreed statement of facts, referred to on file, do not support said judgment.

2. That said judgment, based on said facts, is erroneous and invalid, in that it involves in its rendition a determination and ruling against the plaintiff of certain questions of law presented and arising at the trial, to wit, questions of law shown by each and every of the claims made by the plaintiff in paragraphs 5A, 5B, 7A(1), 7A(2), 7B(1), 7B(2), 9A, 9B and 11 of his application to the defendant, dated August 27, 1932, marked "Exhibit C" and attached to and forming a part of his petition, which said petition, on file, including all papers therein referred to, attached thereto and therein made a part thereof, is hereby referred to; and also certain other questions of law, to wit: (1) that the tax on said dividends of corporations not doing business in Vermont, as to business done outside Vermont, was tantamount to a tax on the securities of said corporations, which said securities were not taxable in Vermont because having their business situs outside Vermont and thus coming under the principle governing the taxation of said securities as tangible personalty having its situs outside Vermont; (2) that by so penalizing or discouraging the [fols. 29 & 30] investment in corporate business carried on outside Vermont, the tax operates as an unlawful interference with interstate commerce through placing a virtual embargo on the exportation of Vermont capital, an important factor of interstate commerce, contrary to section 8 of Article I of the United States Constitution; and each

and every of such determinations and rulings was erroneous for the reasons stated in said claims and herein, respectively.

James C. Colgate, by, Theriault & Hunt, His Attorneys.

[fols. 31 & 32] In Supreme Court of Vermont, Washington County, May Term, 1934

Colgate

v.

Harvey

Judgment—Filed Nov. 7, 1934

In the above entitled cause, the Clerk will enter: Judgment Affirmed.

George M. Powers, for the Court.

We agree: Leighton P. Slack, Sherman R. Moulton, Frank D. Thompson, John C. Sherburne.

We dissent:——.

[File endorsement omitted.]

[fol. 33] In Supreme Court of Vermont, Washington County, May Term, 1934

James C. Colgate

v.

Erwin M. Harvey

All present.

Opinion

Powers, C. J.

The petitioner, a resident and tax-payer of Bennington, Vermont, brings this proceeding under sec. 27, Part I, of No. 17, Acts of 1931, known as the Income and Franchise

Tax Law, seeking relief from the rulings of the tax commissioner fixing the amount of his income tax for the year 1931. The real basis of the petition is the alleged unconstitutionality of the act referred to. The case was heard by county court within and for the county of Washington, Bicknell, J., presiding and judgment was rendered for the defendant. The case is here on a bill of exceptions signed by Buttles, J., under the authority of P. L. 2071.

The grounds upon which the constitutionality of the act is challenged may be stated as follows:

1. That it contravenes section 2 of Article IV of the Federal Constitution which provides that the citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states.

2. That it infringes the Fourteenth Amendment to that Constitution, which provides that no state shall deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws.

3. That it violates Article I and VII of our Bill of Rights, which, speaking broadly, provide for the equality of individuals before the law.

4. That it results in an unwarranted interference with interstate commerce.

[fol. 34] 5. That it attempts to tax the income from dividends on stock in foreign corporations which is tantamount to a tax on the stock itself which has a taxable situs beyond the jurisdiction of this state.

In their practical application, these several provisions have much in common; and as applied to the case in hand, simply mean that the act and the taxes raised thereunder, must be, in a legal sense, uniform and equal. This requirement affects both persons and things; but is met when the law in question imposes no greater burden on one person or species of property than on another similarly situated or of like character.

So far as supposable cases in which a tax law bears more or less unfairly upon an individual tax-payer are concerned, it is quite enough to say, as we did say in Clark v. Burlington, 101 Vt. 391, 410, on the strength of Dane v.

Jackson, U. S. 65 L. ed. 1107, that a tax law is not in conflict with the Fourteenth Amendment unless it "proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation—'to spoilation under the guise of exerting the power of taxing.'" This is so, because a system of taxation has not yet been devised that bears with exact equality and justice upon each and every tax payer or class of taxpayers, and it lies not in the power of the court or any other authority except the legislature to correct such inequalities unless they contravene federal authority or are of the serious quality above indicated.

So in the matter of exemptions and deductions, the legislature is vested with the widest latitude of discretion, and it is only in very exceptional cases that the courts can interfere. Thus, express constitutional restrictions aside, it may exempt an income not exceeding a certain amount. In re Opinion of the Justices, N. H. 138 Atl. 284, 289; it may [fol. 35] make different exemptions as to earned income and income from intangibles. In re Opinion of the Justices, N. H. 149 Atl. 321, 327; McPherson v. Fisher, Ore. 23 Pac. (2d) 913; In re Opinion of the Justices, Mass. 170 N. E. 800, 803. It may allow reasonable deductions of business expenditures from business income. In re Opinion of the Justices N. H. 154 Atl. 632, 633; State v. Tax Commission, Wis. 201 N. W. 764, 766. It may provide for a graduated progressive rate. Bacon v. Ransom, Mo. 56 S. W. (2d) 786. It may allow a reasonable personal exemption and a reasonable deduction for dependents. In re Opinion of the Justices, N. H. 149 Atl. 321, 327; In re Opinion of the Justices, Mass. 170 N. E. 800, 803. It may exempt money loaned on local real estate at a rate of interest not exceeding five per cent. In re Opinion of the Justices, N. H. 138 Atl. 284, 291. N. H. 85 Atl. 757, 758.

That any scheme of taxation must stand this test of uniformity and equality is too well established to be now disputed. It is not here disputed.

That this requirement does not forbid classification of persons or property for purposes of taxation, is equally well established, and is not here questioned.

So the vital question is one of classification. That the power of the legislature in these matters is very broad is

everywhere admitted; and that it is limited only by the requirements, (1) that the classification must be based upon a rational ground,—some difference that bears a just relation to the purpose to be served—and (2) that the members of the several classes shall be treated alike is the unquestioned law of this state. State v. Hoyt, 71 Vt. 59; Hardwick v. Wolcott, 98 Vt. 348; State v. Caplan, 100 Vt. 140; Clark [fol. 36] v. Burlington, 101 Vt. 391; Hartland v. Damon's Est., 103 Vt. 519, 525; Montpelier v. Gates, 106 Vt. 116, 124. That this is the rule of the United States Supreme Court appears from a long line of cases extending from Bell's Cap R. Co. v. Pennsylvania, U. S. 33 L. ed. 892 to Lawrence v. Tax Commission, U. S. 76 L. ed. 1102,—most of which are cited in our cases, above.

The Income and Franchise Tax Law, divides taxable income into two classes; A. Business income,—so denominated in the return called for by the act,—which includes salaries, wages, rents, fees, etc., from the aggregate of which the tax-payer may deduct certain items of interest paid, contributions, bad debts incurred, etc. B. Intangible income including interest,—except interest on money loaned in this state at a rate of interest not exceeding five per cent, * * * dividends on stock in domestic and foreign corporations,—not including stock of corporations subject to a franchise tax under Part II of the act,—etc., subject to certain exemptions not here important, and subject also to a certain personal exemption and a specified dependency exemption, if the income is derived wholly from such intangibles.

The petitioner was not taxable on account of Class A income, as his allowable deductions exceeded the amount received. But by the act, he was taxable for a large sum on account of Class B income, which came very largely from dividends on foreign corporations doing little or no business in this state. His claim here is that he is prejudiced by a discriminatory tax on such stock and that the law is unconstitutional in that it attempts to tax income earned outside the state of Vermont, and because the exemption of five per cent loans applies only to loans in this state. [fol. 37] It may be granted at the outset that a classification for taxing purposes based solely upon residence would be unlawful. A state cannot discriminate against a non-resident, simply because he is a non-resident. Sprague v.

Fletcher, 69 Vt. 69, 75; State v. Caplan, 100 Vt. 140, 154; Howe Machine Co. v. Gage, U. S. 25 L. ed. 754. But this proposition by no means impinges upon the power of a state to make reasonable classifications for taxing purposes.—It simply condemns one basis of classification. It points out a single limitation of the power of classification. It only illustrates the inability of a state, under the guise and form of classification to enforce a tax law which in its practical application abridges the equality of privilege secured to the citizenry of the whole country by the Federal Constitution, unless that classification is based upon reasonable grounds according to the rule hereinbefore referred to. Then, too, as has been pointed out in some of the cases, the principle of this limitation must not be pressed too far. As Mr. Justice Holmes says in Noble State Bank v. Haskell, et al., U. S. 55 L. ed. 112, 116; "Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights."

It is not necesesary that the basis of the classification should be deducible from the nature of the things classified. It is enough if the classification is reasonably founded in "the purposes and policy of taxation." Clark v. Burlington, 101 Vt. 391, 406; Watson v. Comptroller, U. S. 65 L. ed. 170, 175; Stebbin v. Riley, U. S. 69 L. ed. 884, 889. Not only this, but in the Clark case we expressly approved the proposition that the basis of tax classification is not open to objection unless it precludes the assumption that the classification was made in the exercise of legislative judgment [fol. 38] and discretion, as laid down in Campbell v. California, U. S. 50 L. ed. 382, 388, and in Stebbin v. Riley, U. S. 69 L. ed. 884, 889.

It has long been the law of the federal court that the Fourteenth Amendment was not intended to prevent a state from adjustment of its system of taxation to its necessities in all proper and reasonable ways. It does not compel a state to adopt an iron rule of equal taxation. It does not compel a resort to close distinctions or the maintenance of precise scientific uniformity. "Possible differences, not shown to be substantial or which are based upon discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibition." Lawrence v. Tax Commission, U. S. 76 L. ed. 1102, 1108. The amendment does

not preclude the exercise of a wide legislative discretion in passing tax laws which, though involving reasonable discriminations and material qualifications, are deemed necessary for the encouragement of needful and useful industries, and the development of its material and economic interests. Bell's Cap R. Co. v. Pennsylvania, U. S. 33 L. ed. 892, 895; Pacific Express Co. v. Seibert, U. S. 35 L. ed. 1035, 1039; Barbier v. Connolly, U. S. 23 L. ed. 923, 925. Exemptions, diversity of taxation, both as to the amount imposed and the species of property selected, are not inconsistent with uniformity and equality in a legal sense of those terms.

It follows, therefore, that it is not every difference in treatment of a foreign corporation that is discriminatory in the sense that makes it unconstitutional. Any such difference that reasonably results from circumstances and conditions inhering in the difference of residence and is proportional thereto will be upheld.

[fol. 39] Bacon v. State Tax Commission, Mich. 60 L. R. A. 321 involved the constitutionality of a tax law that required an inhabitant of Michigan to pay a tax on all his shares in foreign corporations except national banks,—while his shares in domestic corporations were only taxable when the property of such corporation was untaxed. It was pointed out that the person holding stock in a domestic corporation when property was taxed was not taxed on such stock, while he was taxed on his stock in a foreign corporation, whether its property was taxed or not, and it was claimed that if a law exempted the stock of a domestic corporation under certain conditions it must exempt that of a foreign corporation under the same conditions; and that for lack of this, the law in question resulted in lack of uniformity and equality, and was unconstitutional. It was held otherwise. The court in effect said that while the state of Michigan had no jurisdiction to tax the property of a corporation located outside of its boundaries, it might lawfully tax the stock of such corporations held by its citizens in the way provided by the statute. Among others, the court cites the case of Insurance Co. v. New Orlean, 1 Woods 89, which has been frequently approved by the courts. That was a suit to recover a $1000 tax on a foreign insurance company. It was defended on the ground that the same statute imposed a tax of but $500 on

a domestic insurance company. And it was claimed that the law violated the equality and uniformity clause of the state constitution. The claim was not sustained.

So in Kidd v. Alabama, U. S. 47 L. Ed. 669, 670, it was held that a tax on stock of a railroad incorporated in another state held by a resident of Alabama was valid though no such tax was imposed upon the stock of domestic railroads or those doing business in the state.

See, also, Pembina Cons. Silver M. & M. Co. v. Penn-
[fol. 40] sylvania, U. S. 31 L. ed. 650.

The right of this state to tax the petitioner's stock in the foreign corporations or the income thereof under the mobilia doctrine is assured. Though the federal Supreme Court, in its zeal to avoid the evils of multiple taxation, has laid waste many of its own decisions regarding the taxable locus of tangible personal property, and almost countless state decisions on that subject, it has not yet denied such right. In First National Bank v. Maine, U. S. 77 L. ed. 1401, 1408, Mr. Justice Sutherland, speaking for the Court, calls attention to the changing conditions which influenced the disregard of the ancient maxim mobilia sequuntur personam as applied to perosnal property having a fixed and determined situs, says: "But in respect of intangible property, the rule is still convenient and useful, if not always necessary; and it has been adhered to as peculiarly applicable to that class of property." It is to be observed, however, that the learned Justice was careful to note that shares of stock and other intangibles might be so used in the foreign state as to acquire an actual situs there analogous to that of tangible personal property under the recent holdings of the court. There is nothing in the case in hand, however, to indicate any such foreign situs.

It was held in Kirtland v. Hotchkiss, U. S. 25 L. ed. 558, 562, that a state may lawfully tax a debt due from a non-resident, and that such a law does not violate any of the constitutional provisions here relied upon by the petitioner.

And finally, Lawrence v. Tax Commission, U. S. 76 L. ed. 1102, affirms the new rule as to situs of tangible personalty, shows the inapplicability of that rule to the taxation of intangibles, and holds that a state statute taxing

a resident on income earned in another state is valid and enforceable.

With these principles in mind the difficulties presented by the record largely disappear. Under them, the first, sec- [fol. 41] ond and third grounds above stated are unavailing.

There is no merit in the claim that this tax unlawfully interferes with interstate commerce. It is not a tax against the corporation or upon its property. It is a tax against the individual and upon his property. It imposes no restrictions upon the transportation into this state of the products of the foreign corporation or upon their sale here. It does not take effect until the interstate transportation, if any, has been completed, the goods sold, money collected, a dividend declared and paid. The activities of the corporation are not, in the slightest degree, embarrassed or affected. Pembina Co. Silver M. & M. Co. v. Pennsylvania, U. S. 31 L. ed. 650, 652; Hiesler v. Thomas Colliery Co., Pa. 24 A. L. R. 1215, 1223; Shaffer v. Carter, U. S. 64 L. ed. 445, 449; Kirtland v. Hotchkiss, U. S. 25 L. ed. 558, 562; Hall v. Geiger-Jones Co., U. S. 61 L. ed. 480, 492, and cases cited.

Nor is there any merit in the claim that the petitioner is unduly prejudiced by the exemption of dividends of corporations subject to a franchise tax or in the method of arriving at the basis of the franchise tax. It is to be noted that throughout the act, foreign and domestic corporations are treated alike. The exemptions provided for in Part I apply to both. The franchise tax of Part II applies to both. The basis of that tax is the same—the amount of business done in this state. If all that business is done in this state, the entire net income is subject to the franchise tax. If only part of the business is done here, the net income of that part is, alone, subject thereto. And that part of the dividends earned outside the state is, alone, subject to the income tax. All of these provisions apply as well to domestic as foreign corporations. The purpose of these provisions is obvious. The legislature, in the exercise of a wise discretion, thus avoided a double tax on a single economic interest. It obviated the imposition of an [fol. 42] income tax and a franchise tax on things so intimately related as to be entitled to the special consideration of the legislature in framing its taxing scheme.

Income taxes may result in double taxation, and frequently do, and yet they are valid. A non-resident may be taxed on the franchise of doing business in this state, and the income from that business may also be taxed here. Shaffer v. Carter, U. S. 64 L. ed. 445, 458. The state has as much taxing authority over a resident. But there is no constitutional requirement that income taxes shall be levied without regard to multiple taxation, and the legislature is not precluded from avoiding such a result if it can do so without transgressing the limits of valid classification as herein defined. Such a deduction as is now under discussion is in essence a means of equalizing the burden of taxation rather than an exemption. State v. Frear, Wis. Ann. Cas. 1913A, 1147, 1156. The provision is free from constitutional objections and is well within the principles laid down in Kidd v. Alabama, U. S. 47 L. ed. 669, 672 and Darnell v. Indiana, U. S. 57 L. ed. 267, 272.

In determining the basis of such taxes, even in the case of a non-resident taxpayer, the amount of business done outside the state may be used as a measure. Maxwell v. Bugbee, U. S. 63 L. ed. 1124, 1131.

There is no constitutional infirmity in the exemption of five per cent Vermont loans. Opinions of Justices of New Hampshire, supra. The state argues that this is but an extension of a settled state policy. But we prefer to put our decision on the broad ground that a state may, in the interests of thrift and state development, make such reasonable exemptions as this. That it may so encourage its taxpayers to keep Vermont money invested here for the assistance of the agricultural and industrial interests of the state.

[fol. 3] The petitioner claims that he was entitled to a deduction of $800 as a married man living with his wife; or if not entitled, the act arbitrarily and unreasonably discriminates against him and others in like circumstances and is in this respect unconstitutional. The language of the act is as follows: "In case the income taxed in this section is derived wholly from ownership of or interest in any stock, bond, note or other interest bearing security, there shall be deducted from such income" a personal exemption of eight hundred dollars in the case of a married person living with husband or wife. But if either a hus-

band or wife, it is provided, shall receive any income other than that above specified, the exemption shall not be allowed. All the income taxed to the petitioner was on intangibles, but he received certain items of business income during the year. So he was not, under the statute entitled to the exemption. With the practical fairness or the wisdom of these provisions we have nothing to do. We are only concerned with the constitutional power of the legislature to enact them. The petitioner is treated by the law just as every other tax-payer, simiarly situated, is treated. The legislature has a wide latitude of discretion in these matters, and may make reasonable classifications of income from different sources. Shields v. Williams, Tenn. 19 S. W. (2d) 261; and as we have seen, may provide different exemptions for different classes. McPherson v. Fisher, Ore. 23 Pac. (2d) 913. The claim is not sustained.

The petitioner also claims that he is entitled to a deduction from his net income the $2000 personal exemption provided for in section 11 of the act. An examination of the act discloses that it uses the term "net income" only with reference to Class A, or business income. Part I, sec. 3. It defines net income in section 5 as meaning the gross income less the deductions allowed by the act. Section 6 defines gross income as including the items which are [fols. 44 & 45] included in Class A. If there is nothing left after the gross income has been reduced by these deductions, there is nothing from which the $2000 exemption can be taken, for it is expressly provided in Section 11 that it shall be deducted from the net income. This is the petitioner's situation. And for the reasons above specified, this result does not establish the unconstitutionality of the act. This claim, too, is rejected.

We have considered all the questions raised by the record and find nothing in the statute that conflicts with the State or Federal Constitution. We reach this conclusion without resort to the well established rule that one who challenges the constitutionality of an act of the legislature carries the burden of showing it—not only by a preponderance of evidence, but beyond a reasonable doubt. In such cases, the court deals not with probabilities, but with moral certainties.

Judgment affirmed.

[fol. 46] IN SUPREME COURT OF VERMONT

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL

To the Honorable George M. Powers, Chief Justice of the Supreme Court of the State of Vermont:

Your petitioner, James C. Colgate, the appellant in the above entitled action, respectfully alleges:

1. At a General Term of the Supreme Court of the State of Vermont, begun and held at Montpelier, on the first Tuesday of November, A. D. 1934, final judgment was made and entered in an action then and there pending, entitled James C. Colgate v. Erwin M. Harvey, Commissioner of Taxes, affirming a judgment of the Washington County Court, Washington County, Vermont, entered on the 15th day of February 1934, in favor of the said Erwin M. Harvey, Tax Commissioner, and against said James C. Colgate, your Petitioner, on an agreed statement of facts and that said Erwin M. Harvey recover his costs. Such costs have been taxed in the sum of $30.80.

2. That said Supreme Court of the State of Vermont was then and there, and still is, the highest Court of said State in which a decision in said suit could be had.

3. There was drawn in question in the said suit the validity of a statute of the said State of Vermont, to wit, the Vermont Income and Franchise Tax Act of 1931, being [fols. 47 & 48] Act No. 17 of the Public Acts of 1931 of the State of Vermont, on the ground that said statute was repugnant to the Constitution of the United States and the decision in said suit was in favor of the validity of said statute.

Wherefore, your Petitioner, considering himself aggrieved by the said final decision of the said Supreme Court of the State of Vermont, hereby appeals to the Supreme Court of the United States and prays that said appeal be allowed and a citation issued directed to Erwin M. Harvey, Tax Commissioner of the State of Vermont, the appellee herein, commanding him to appear before said Supreme Court of the United States sitting at Washing-

ton, District of Columbia, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record and proceeding in this cause, duly authenticated, may be transmitted to the said Supreme Court of the United States to the end that the errors complained of by your Petitioner may be examined and corrected and the said judgment reversed, and that your Petitioner may be granted the relief to which he may be found to be entitled and that any taxes, interest or penalties paid, and found to be illegally assessed, shall be ordered refunded to your Petitioner with interest at six percent. per annum from the time of payment, with costs, and that judgment may be entered herein accordingly; and your Petitioner, desiring to supersede execution on the judgment rendered against him as aforesaid, here tenders bond in such sum as the Court may require for such purpose and prays that with the allowance of the appeal, a supersedeas may be issued.

Dated: Bennington, Vermont, January 31st, 1935.

(Signed) Jas. C. Colgate, Petitioner. George L. Hunt, E. J. Dimock, Attorneys for Petitioner.

[fol. 49] IN SUPREME COURT OF VERMONT

[Title omitted]

ORDER ALLOWING APPEAL

The above named James C. Colgate having prayed for the allowance of an appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Vermont, made and entered at a General Term of said Court, begun and held at Montpelier on the first Tuesday of November, A. D. 1934, affirming a judgment of the Washington County Court, Washington County, Vermont, entered on the 15th day of February, 1934, in a suit entitled, "James C. Colgate v. Erwin M. Harvey, Tax Commissioner", in favor of said Erwin M. Harvey and against the said James C. Colgate on an agreed statement of facts and that said Erwin M. Harvey recover his costs,

And said James C. Colgate having presented his petition for appeal, assignment of errors, prayer for reversal,

and statement under Rule 12 of the Rules of the Supreme Court of the United States,

And it appearing therefrom, and from the record in said suit, that said proposed appeal is from a final judgment of the highest Court of this State in which a decision in said suit can be had and that there was drawn in question the validity of Act No. 17 of the Public Acts of 1931 of [fols. 50 & 51] the State of Vermont on the ground of its being repugnant to the Constitution of the United States, and that the decision in said suit was in favor of the validity of said statute, now, therefore, it is hereby

Ordered, that an appeal be, and the same hereby is, allowed from the said final judgment of this Court to the Supreme Court of the United States and the bond on appeal, conditioned as required by law, is hereby fixed in the sum of $250.00 which bond shall operate as a cost and supersedeas bond and shall stay and suspend all further proceedings upon said judgment until the determination of said appeal.

Further ordered, that the Clerk of the Supreme Court of the State of Vermont, within thirty days from the date hereof, make, authenticate and transmit to the Clerk of the Supreme Court of the United States as a transcript of the record herein containing fully and truly all material parts of the record herein which shall be designated by praecipe filed with him by either of the parties hereto.

Dated: Montpelier, Vermont, February 4, 1935.

George M. Powers, Chief Justice of the Supreme Court of the State of Vermont.

[fol. 52] IN SUPREME COURT OF VERMONT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the appellant, James C. Colgate, by E. J. Dimock and George L. Hunt, his attorneys, and respectfully submits, presents and files its assignments of error complained of and says:

That in the records and proceedings of the Honorable Supreme Court of the State of Vermont in the above en-

titled cause and in the determination of the issues raised therein there is manifest error to the injury and prejudice of the said appellant and for such error the appellant assigns the following:

1a. The said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at the rate of 4% on income amounting to $130,875.39 received by the appellant in the year 1931 as dividends or parts thereof on stocks of corporations the income of which was in whole or in such parts not subject to taxation as against such corporations at the rate of 2% under Part II of said Public Act No. 17 because earned without the State of Vermont, but imposed no tax upon the amounts received as dividends or parts thereof on stocks [fol. 53] of corporations the income of which was in whole or in such parts subject to taxation as against such corporations at the rate of 2% under Part II of said Act because earned within the State of Vermont,

Did not abridge said appellant's privileges and immunities as a citizen of the United States in violation of the Fourteenth Amendment of the Constitution of the United States.

1b. That said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at the rate of 4% on income amounting to $130,875.39 received by the appellant in the year 1931 as dividends or parts thereof on stocks of corporations the income of which was in whole or in such parts not subject to taxation as against such corporations at the rate of 2% under Part II of said Public Act No. 17 because earned without the State of Vermont, but imposed no tax upon the amounts received as dividends or parts thereof on stocks of corporations the income of which was in whole or in such parts subject to taxation as against such corporations at the rate of 2% under Part II of said Act because earned within the State of Vermont,

Did not abridge said appellant's privileges and immunities as a citizen and resident of the State of Vermont in

violation of Article IV, Section 2, of the Constitution of the United States.

1c. The said Court erred in ruling that

[fol. 54] The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at the rate of 4% on income amounting to $130,875.39 received by the appellant in the year 1931 as dividends or parts thereof on stocks of corporations the income of which was in whole or in such parts not subject to taxation as against such corporations at the rate of 2% under Part II of said Public Act No. 17 because earned without the State of Vermont, but imposed no tax upon the amounts received as dividends or parts thereof on stocks of corporations the income of which was in whole or in such parts subject to taxation as against such corporations at the rate of 2% under Part II of said Act because earned within the State of Vermont,

Did not deprive said appellant of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

1d. The said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at the rate of 4% on income amounting to $130,875.39 received by the appellant in the year 1931 as dividends or parts thereof on stocks of corporations the income of which was in whole or in such parts not subject to taxation as against such corporations at the rate of 2% under Part II of said Public Act No. 17 because earned without the State of Vermont, but imposed no tax upon the amount received as dividends or parts thereof on stocks [fol. 55] of corporations the income of which was in whole or in such parts subject to taxation as against such corporations at the rate of 2% under Part II of said Act because earned within the State of Vermont,

Did not deny said appellant the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

1e. The said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931.

Which imposed a tax at the rate of 4% on income amounting to $130,875.39 received by the appellant in the year 1931 as dividends or parts thereof on stocks of corporations the income of which was in whole or in such parts not subject to taxation as against such corporations at the rate of 2% under Part II of said Public Act No. 17 because earned without the State of Vermont, but imposed no tax upon the amounts received as dividends or parts thereof on stocks of corporations the income of which was in whole or in such parts subject to taxation as against such corporations at the rate of 2% under Part II of said Act because earned within the State of Vermont,

Did not interfere with interstate or foreign commerce in violation of Section 8 of Article I of the Constitution of the United States.

2a The said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

[fol. 56] Which imposed a tax at the rate of 4% on income amounting to $25,945.00 received by the appellant in the year 1931 as interest on account of money loaned without the State of Vermont, or on account of credits representing the purchase price in whole or in part of real estate without the State of Vermont, bearing interest at a rate of not exceeding 5% per annum, and evidenced by a promissory note, mortgage on real estate or a bond for a deed, but imposed no tax on income received as interest on account of such a loan within the State of Vermont, or on account of such a credit with respect to real estate within the State of Vermont, bearing such interest and evidenced by such obligations,

Did not abridge said appellant's privileges and immunities as a citizen of the United States in violation of the Fourteenth Amendment of the Constitution of the United States.

2b. The said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at a rate of 4% on income amounting to $25,945.00 received by the appellant in the year 1931 as interest on account of money loaned without the State of Vermont or on account of credits representing the purchase pricei n whole or in part of real estate without the State of Vermont, bearing interest at a rate of not exceeding 5% per annum, and evidenced by a promissory note, mortgage on real estate or a bond for a deed, but imposed no tax on income received as interest on account of such a [fol. 57] loan within the State of Vermont, or on account of such a credit with respect to real estate within the State of Vermont, bearing such interest and evidenced by such obligations,

Did not abridge said appellant's privileges and immunities as a citizen and resident of the State of Vermont in violation of Article IV, Section 2, of the Constitution of the United States.

2c. The said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at a rate of 4% on income amounting to $25,945.00 received by the appellant in the year 1931 as interest on account of money loaned without the State of Vermont, or on account of credits representing the purchase price in whole or in part of real estate without the State of Vermont, bearing interest at a rate of not exceeding 5% per annum, and evidenced by a promissory note, mortgage on real estate or a bond for a deed, but imposed no tax on income received as interest on account of such a loan within the State of Vermont, or on account of such a credit with respect to real estate within the State of Vermont, bearing such interest and evidenced by such obligations,

Did not deprive said appellant of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

2d. The said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts [fol. 58] of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at a rate of 4% on income amounting to $25,945.00 received by the appellant in the year 1931

as interest on account of money loaned without the State of Vermont, or on account of credits representing the purchase price in whole or in part of real estate without the State of Vermont, bearing interest at a rate of not exceeding 5% per annum; and evidenced by a promissory note, mortgage on real estate or a bond for a deed, but imposed no tax on income received as interest on account of such a loan within the State of Vermont, or on account of such a credit with respect to real estate within the State of Vermont, bearing such interest and evidenced by such obligations.

Did not deny said appellant the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

2e. The said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at a rate of 4% on income amounting to $25,945.00 received by the appellant in the year 1931 as interest on account of money loaned without the State of Vermont, or on account of credits representing the purchase price in whole or in part of real estate without the State of Vermont, bearing interest at a rate of not exceeding 5% per annum, and evidenced by a promissory note, [fol. 59] mortgage on real estate or a bond for a deed, but imposed no tax on income received as interest on account of such a loan within the State of Vermont, or on account of such a credit with respect to real estate within the State of Vermont, bearing such interest and evidenced by such obligations,

Did not interfere with interstate or foreign commerce in violation of Section 8 of Article I of the Constitution of the United States.

3a. The said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at a rate of 4% on income amounting to $21,927.77 received by the appellant in the year 1931 as interest on account of money loaned either within or without the State of Vermont, or on account of credits rep-

resenting the purchase price in whole or in part of real estate either within or without the State of Vermont, bearing interest at a rate exceeding 5% per annum, and evidenced by a promissory note, mortgage on real estate, or a bond for a deed, but imposed no tax on income received as interest on account of money loaned within the State of Vermont, or on account of credits representing the purchase price in whole or in part of real estate within the State of Vermont, bearing interest at a rate not exceeding 5% per annum and evidenced by such obligations,

Did not abridge said appellant's privileges and immunities as a citizen of the United States in violation of the Fourteenth Amendment of the Constitution of the United States.

[fol. 60] 3b. The Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at the rate of 4% on income amounting to $21,927.77 received by the appellant in the year 1931 as interest on account of money loaned either within or without the State of Vermont, or on account of credits representing the purchase price in whole or in part of real estate either within or without the State of Vermont, bearing interest at a rate exceeding 5% per annum, and evidenced by a promissory note, mortgage on real estate, or a bond for a deed, but imposed no tax on income received as interest on account of money loaned within the State of Vermont, or on account of credits representing the purchase price in whole or in part of real estate within the State of Vermont, bearing interest at a rate not exceeding 5% per annum and evidenced by such obligations.

Did not abridge said appellant's privileges and immunities as a citizen and resident of the State of Vermont in violation of Article IV, Section 2, of the Constitution of the United States.

3c. The said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at the rate of 4% on income amounting to $21,927.77 received by the appellant in the year

1931 as interest on account of money loaned either within [fol. 61] or without the State of Vermont, or on account of credits representing the purchase price in whole or in part of real estate either within or without the State of Vermont, bearing interest at a rate exceeding 5% per annum, and evidenced by a promissory note, mortgage on real estate, or a bond for a deed, but imposed no tax on income received as interest on account of money loaned within the State of Vermont, or on account of credits representing the purchase price in whole or in part of real estate within the State of Vermont, bearing interest at a rate not exceeding 5% per annum and evidenced by such obligations,

Did not deprive said appellant of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

3d. The said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at the rate of 4% on income amounting to $21,927.77 received by the appellant in the year 1931 as interest on account of money loaned either within or without the State of Vermont, or on account of credits representing the purchase price in whole or in part of real estate either within or without the State of Vermont, bearing interest at a rate exceeding 5% per annum, and evidenced by a promissory note, mortgage on real estate, or a bond for a deed, but imposed no tax on income received as interest on account of money loaned within the State of [fol. 62] Vermont, or on account of credits representing the purchase price in whole or in part of real estate within the State of Vermont, bearing interest at a rate not exceeding 5% per annum and evidenced by such obligations,

Did not deny said appellant the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

3e. The said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at the rate of 4% on income amounting to $21,927.77 received by the appellant in the year 1931

as interest on account of money loaned either within or without the State of Vermont, or on account of credits representing the purchase price in whole or in part of real estate either within or without the State of Vermont, bearing interest at a rate exceeding 5% per annum, and evidenced by a promissory note, mortgage on real estate, or a bond for a deed, but imposed no tax on income received as interest on account of money loaned within the State of Vermont, or on account of credits representing the purchase price in whole or in part of real estate within the State of Vermont, bearing interest at a rate not exceeding 5% per annum and evidenced by such obligations,

Did not interfere with interestate or foreign commerce in violation of Section 8 of Article I of the Constitution of the United States.

4a. The said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and [fol. 63] Franchise Tax Act of 1931,

Which imposed a tax at the rate of 4% on $800 of income derived by the appellant from his ownership of and interest in stocks, bonds, notes and other interest bearing securities, but which, by Section 3 of said Public Act No. 17, would have eliminated said $800 of income from taxation, as a personal exemption of a married individual living with his wife, if he had not received any income other than that derived from said sources,

Did not abridge said appellant's privileges and immunities as a citizen of the United States in violation of the Fourteenth Amendment of the Constitution of the United States.

4b. The said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at the rate of 4% on $800 of income derived by the appellant from his ownership of and interest in stocks, bonds, notes and other interest bearing securities, but which, by Section 3 of said Public Act No. 17 would have eliminated said $800 of income from taxation, as a personal exemption of a married individual living with his wife, if he had not received any income other than that derived from said sources,

Did not abridge said appellant's privileges and immunities as a citizen and resident of the State of Vermont in violation of Article IV, Section 2, of the Constitution of the United States.

[fol. 64] 4c. The said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at the rate of 4% on $800 of income derived by the appellant from his ownership of and interest in stocks, bonds, notes and other interest bearing securities, but which, by Section 3 of said Public Act No. 17 would have eliminated said $800 of income from taxation, as a personal exemption of a married individual living with his wife, if he had not received any income other than that derived from said sources,

Did not deprive said appellant of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

4d. The said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at the rate of 4% on $800 of income derived by the appellant from his ownership of and interest in stocks, bonds, notes and other interest bearing securities, but which, by Section 3 of said Public Act No. 17 would have eliminated said $800 of income from taxation, as a personal exemption of a married individual living with his wife, if he had not received any income other than that derived from said sources.

Did not deny said appellant the equal protection of the laws in violation of the Fourteenth Amendment of the [fols. 65 & 66] Constitution of the United States.

Dated: January 31st, 1935.

Jas. C. Colgate, Appellant. George L. Hunt and E. J. Dimock, Attorneys for the Appellant.

[fols. 67 & 68] Citation in usual form omitted in printing.

[fols. 69-72] Supersedeas Bond on Appeal for 250.00 approved Feb. 6, 1935. Omitted in printing.

[fol. 73] IN SUPREME COURT OF VERMONT.

[Title omitted]

OFFICER'S RETURN OF SERVICE

STATE OF VERMONT,
Washington County, ss.

At Montpelier, in said county, on this 5th day of February, A. D. 1935, I made service of the foregoing citation on the appellee Erwin M. Harvey, Tax Commissioner of the State of Vermont, by delivering to him a true and attested copy of said citation together with a true copy of the following papers in the above entitled cause, on file with Joseph G. Frattini, Esq., Clerk of the Supreme Court of said State of Vermont, namely: (1) Petition for allowance of appeal; (2) Order allowing appeal; (3) Assignments of error; (4) Statement under Rule 12 of the United States Supreme Court; (5) Notice of appeal and notice required by Rule 12; with my return hereon thereon endorsed.

And on the same day, to wit, the 5th day of February, A. D. 1935, I made service of said citation on Lawrence C. Jones, Attorney General of said State of Vermont and attorney for said Erwin M. Harvey, by delivering to him, at said Montpelier, a true and attested copy of said citation together with a true copy of the following papers in the above entitled cause, on file with Joseph G. Frattini, Esq., Clerk of the Supreme Court of said State of Vermont, namely: (1) Petition for allowance of appeal; (2) Order [fols. 74 & 75] allowing appeal; (3) Assignments of error; (4) Statement under Rule 12 of the United States Supreme Court; (5) Notice of appeal and notice required by Rule 12; with my return hereon thereon endorsed.

Attest: H. C. Lawson, Sheriff of Washington County, State of Vermont.

Fees:

2 copies, $3.00
2 miles, .30

$3.30

[fol. 76] IN SUPREME COURT OF VERMONT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Honorable Supreme Court of the State of Vermont:

You are hereby directed in the preparation of the transcript of the record on the appeal of James C. Colgate, Appellant, to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Vermont, entered in the above entitled suit at a General Term of said Supreme Court of the State of Vermont, begun and held at Montpelier on the first Tuesday of November, A. D. 1934, to incorporate the following proceedings, documents and portions of the record in said transcript, namely:

1. Your docket entries.

2. The Case in the Supreme Court of Vermont, including
   (a) The Index.
   (b) The Plaintiff's Bill of Exceptions.
   (c) The Petition, together with Exhibits A, B, C, D and E and the recognizance and summons annexed thereto.
   (d) The Agreed Statement of Facts.
   (e) The Judgment Order of the Washington County Court in Vacation, dated February 15, 1934.
[fol. 77] (f) The Plaintiff's Exceptions to said Judgment of the Washington County Court.

3. The Final Judgment of the Supreme Court of the State of Vermont entered at the General Term of said Court, begun and held at Montpelier on the first Tuesday of November, A. D. 1934 affirming the judgment of the Washington County Court.

4. The Opinion of the Supreme Court of the State of Vermont.

5. Appellant's Petition for Allowance of Appeal to the Supreme Court of the United States.

6. Order allowing such Appeal.

7. Appellant's Assignments of Error.

8. Appellant's Statement Under Rule 12 of the Rules of the Supreme Court of the United States.

9. Citation on Appeal.

10. Bond on Appeal.

11. Appellant's Notice of Appeal and Notice Required by Rule 12 of the Rules of the Supreme Court of the United States.

12. The Sheriff's Return of Service of the Citation on Appeal, Petition for Allowance of Appeal, Order Allowing Appeal, Assignments of Error, Statement under Rule 12 of the Rules of the United States Supreme Court and Notice of Appeal and Notice Required by Rule 12.

13. Appellee's statement, if any, disclosing any matter or ground making against the jurisdiction of the Supreme Court of the United States.

14. Appellee's motion to dismiss or affirm, if any.

15. This Præcipe.

[fol. 78] Dated: Montpelier, Vermont, February 18, 1935.

E. J. Dimock, and George L. Hunt, Attorneys for Appellant.

[fols. 79 & 80] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 81] IN SUPREME COURT OF THE UNITED STATES

AFFIDAVIT OF SERVICE OF STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed March 21, 1935

UNITED STATES OF AMERICA,
State of New York, County of New York, ss:

Cornelius O. Donahue, being duly sworn, deposes and says:

I reside at 77 Rutland Road, Borough of Brooklyn, City and State of New York. I am over the age of 21 years and am not a party to the above entitled cause. I am an attorney at law admitted to practice in all courts of the State of New York and am associated with E. J. Dimock, counsel for the Appellant in the above entitled cause.

On the 20th day of March, 1935, I served the annexed Statement of Points to be Relied upon and Designation of the Parts of the Record to be Printed upon Erwin M. Harvey, Tax Commissioner, Appellee, and upon Lawrence C. Jones, Attorney General of the State of Vermont, and counsel for the Appellee herein, as follows:

1. By depositing a true copy thereof in the United States mail in a Post Office Box regularly maintained by the Government of the United States at 49 Wall Street, Borough of Manhattan, City and State of New York, properly en- [fol. 82] closed in a securely closed wrapper, with the postage thereon prepaid, addressed to said Erwin M. Harvey, Tax Commissioner, at his office in the State House, Montpelier, Vermont.

2. By depositing a true copy thereof in the United States mail in a Post Office Box regularly maintained by the Government of the United States at 49 Wall Street, Borough of Manhattan, City and State of New York, properly enclosed in a securely closed wrapper, with the postage thereon prepaid, addressed to said Lawrence C. Jones, Attorney General of the State of Vermont, at his office in the State House, Montpelier, Vermont.

Cornelius O. Donahue.

Subscribed and sworn to before me this 20th day of March, 1935. J. Herrick Schoonmaker. Notary Public, Ulster County, Certificate filed in New York County. Clerk's No. 1552, Register's No. 6S950. Commission expires March 30, 1936.

[fol. 83] SUPREME COURT OF THE UNITED STATES

STATEMENTS OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed March 21, 1935

Now comes the appellant in the above entitled cause and states that the points upon which he intends to rely in this Court in this case are as follows:

1. The Supreme Court of the State of Vermont erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at the rate of 4% on income amounting to $130,875.39 received by the appellant in the year 1931 as dividends or parts thereof on stocks of corporations the income of which was in whole or in such parts not subject to taxation as against such corporations at the rate of 2% under Part II of said Public Act No. 17 because earned without the State of Vermont, but imposed no tax upon the amounts received as dividends or parts thereof on stocks of corporations the income of which was in whole or in such parts subject to taxation as against such corporations at the rate of 2% under Part II of said Act because earned [fol. 84] within the State of Vermont:

A. Did not abridge said appellant's privileges and immunities as a citizen of the United States in violation of the Fourteenth Amendment of the Constitution of the United States.

B. Did not abridge said appellant's privileges and immunities as a citizen and resident of the State of Vermont in violation of Article IV, Section 2, of the Constitution of the United States.

C. Did not deprive said appellant of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

D. Did not deny said appellant the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

E. Did not interfere with interstate or foreign commerce in violation of Section 8 of Article I of the Constitution of the United States.

2. The said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at the rate of 4% on income amounting to $25,945.00 received by the appellant in the year 1931 as interest on account of money loaned without the State [fol. 85] of Vermont, or on account of credits representing

the purchase price in whole or in part of real estate without the State of Vermont, bearing interest at a rate of not exceeding 5% per annum, and evidenced by a promissory note, mortgage on real estate or a bond for a deed, but imposed no tax on income received as interest on account of such a loan within the State of Vermont, or on account of such a credit with respect to real estate within the State of Vermont, bearing such interest and evidenced by such obligations,

A. Did not abridge said appellant's privileges and immunities as a citizen of the United States in violation of the Fourteenth Amendment of the Constitution of the United States.

B. Did not abridge said appellant's privileges and immunities as a citizen and resident of the State of Vermont in violation of Article IV, Section 2, of the Constitution of the United States.

C. Did not deprive said appellant of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

D. Did not deny said appellant the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

E. Did not interfere with interstate or foreign commerce in violation of Section 8 of Article I of the Constitution of the United States.

[fol. 86] 3. The said Court erred in ruling that

The provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931,

Which imposed a tax at the rate of 4% on $800. of income derived by the appellant from his ownership of and interest in stocks, bonds, notes and other interest bearing securities, but which, by Section 3 of said Public Act No. 17, would have eliminated said $800. of income from taxation, as a personal exemption of a married individual living with his wife, if he had not received any income other than that derived from said sources,

A. Did not abridge said appellant's privileges and immunities as a citizen of the United States in violation of the Fourteenth Amendment of the Constitution of the United States.

B. Did not abridge said appellant's privileges and immunities as a citizen and resident of the State of Vermont in violation of Article IV, Section 2, of the Constitution of the United States.

C. Did not deprive said appellant of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

D. Did not deny said appellant the equal protection of the laws in violation of Fourteenth Amendment of the Constitution of the United States.

[fol. 87] And the appellant further states that only the following parts of the record as filed in this Court need to be printed by the Clerk for the hearing of the case.

1. The docket entries of the Clerk of the Supreme Court of the State of Vermont.

2. The case in the Supreme Court of the State of Vermont, including

(a) The Plaintiff's Bill of Exceptions
(b) The Petition, together with Exhibits A, B, C, D and E, and the recognizance and summons annexed thereto
(c) The Agreed Statement of Facts
(d) The Judgment Order of the Washington County Court in Vacation, dated February 15, 1934
(e) The Plaintiff's Exceptions to said judgment of the Washington County Court.

3. The Final Judgment of the Supreme Court of the State of Vermont entered at the General Term of said Court, begun and held at Montpelier on the first Tuesday of November, A. D. 1934 affirming the judgment of the Washington County Court.

4. The Opinion of the Supreme Court of the State of Vermont.

5. Appellant's Petition for allowance of Appeal to the Supreme Court of the United States.

6. Order Allowing such Appeal.

7. Appellant's Assignments of Error.

8. Citation on Appeal.

9. Appellant's Notice of Appeal and Notice Required by Rule 12 of the Rules of the Supreme Court of the United States.

[fols. 88 & 89] 10. The Sheriff's Return of Service of the Citation on Appeal, Petition for Allowance of Appeal, Order Allowing Appeal, Assignments of Error, Statement under Rule 12 of the Rules of the United States Supreme Court and Notice of Appeal and Notice Required by Rule 12.

11. The Appellant's Præcipe.

12. This Statement of Points to be Relied upon and Designation of the Parts of the Record to be Printed.

Dated: March 19, 1935.

E. J. Dimock, Counsel for Appellant.

[fol. 90] [File endorsement omitted.]

Endorsed on cover: File No. 39,418. Vermont, Supreme Court. Term No. 790. James C. Colgate, Appellant, vs. Erwin M. Harvey, Tax Commissioner of the State of Vermont. Filed March 18, 1935. File No. 790 O. T. 1934.

FILE COPY

Office Supreme Court
FILED
MAR 18 1
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. [redacted] 8

JAMES C. COLGATE,

Appellant,

vs.

ERWIN M. HARVEY, TAX COMMISSIONER OF THE STATE OF VERMONT.

APPEAL FROM THE SUPREME COURT OF THE STATE OF VERMONT.

STATEMENT AS TO JURISDICTION.

GEORGE L. HUNT,
E. J. DIMOCK,
Counsel for Appellant.

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IN THE SUPREME COURT OF THE STATE OF VERMONT

JAMES C. COLGATE,

Appellant,

against

ERWIN M. HARVEY, Tax Commissioner,

Appellee.

STATEMENT UNDER RULE 12 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

I. Basis of Jurisdiction of the Supreme Court of the United States.

The basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question is that said appeal is from a final judgment of the Supreme Court of the State of Vermont, which is the highest court of said State in which a decision in this suit can be had. There is drawn in question in this suit the validity of a statute of the State of Vermont on the ground of its being repugnant to the Constitution of the United States and the said final judgment is a decision in favor of the validity of the said statute.

II. Statutory Provisions Sustaining Jurisdiction.

The statutory provisions which sustain the jurisdiction of the Supreme Court of the United States are Section 237, sub-division (a) of the Judicial Code of the United States, as amended, by Chapter 14 of the Act of January 31, 1928

(45 Stat. 54), as amended by Chapter 440 of the Act of April 26, 1928 (45 Stat. 466).

III. Statute of State of Vermont, the Validity of Which Is Involved.

The statute of the State of Vermont, the validity of which is involved, is Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the "Income and Franchise Tax Act of 1931." Said statute may be found at pages 17 to 46 inclusive, in the official edition of "Acts and Resolves Passed by the General Assembly of the State of Vermont at the Thirty-First Biennial Session." The pertinent provisions of the said statute are here set out verbatim as follows:

Part I.

"Sec. 3. *Rate; Exemptions; Amount.*—A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually, with respect to

"First, his net income as herein defined, after deducting the exemptions provided in this act, at the rate of two per cent; and

"Second, to the income received by him on account of the ownership or use of or interest in any stock, bond, note, agreement or other interest bearing security at the rate of four per cent; provided, however, that the words 'income received by him on account of the ownership or use of or interest in any stock, bond, note, agreement or other interest bearing security' shall not include the following items, which shall be exempt from taxation under this act:

"(a) Interest received on account of money loaned within this state, at a rate of interest not exceeding five per cent per annum evidenced by a promissory note, mortgage on real estate or a bond for a deed, including credits representing the purchase price, or any part thereof, of real estate within this state, sold or

transferred, evidenced by a promissory note, mortgage or bond for a deed bearing a rate of interest not exceeding five per cent per annum;

* * * * * * *

"(d) Dividends on stocks of those corporations which are subject to taxation under Part II of this act; provided, however, that if a corporate franchise tax is not measured by the entire net income of such corporation, then a portion of the dividends paid by such corporation shall be taxable under Part I of this act, and such taxable portion shall be that proportion of the dividend as the income earned by the corporation from business done without the state of Vermont bears to the entire income of the corporation.

"Such taxes shall first be levied, collected and paid in the year 1932 and with respect to the net income received during the calendar year 1931 or during any income year ending during the twelve months ending March 31, 1932.

"(e) In case the income taxed in this section is derived wholly from ownership of or interest in any stock, bond, note or other interest bearing security, there shall be deducted from such income the following exemptions:

"First: In case of a single individual a personal exemption of $400.

"Second: In the case of the head of a family, or a married individual living with husband or wife, a personal exemption of $800; but if either a husband or wife shall receive any income other than that derived from the ownership of or interest in any stock, bond, note or other interest bearing security, then such personal exemption shall not be allowed. A husband and wife living together shall receive but one personal exemption of $800 against their aggregate net income; and in case they make separate returns, the personal exemption of $800 may be taken by either or divided between them." (pp. 18 and 19.)

PART II.

"Sec. 2. *Rate.*—For the privilege of exercising its franchise in this state in a corporate or organized capacity, every domestic corporation, and for the privilege of doing business in this state every foreign corporation, liable to tax under this act shall annually pay to this state for the privilege of carrying on or doing business by it within this state, a franchise tax to be measured by its net income to be computed in the manner hereinafter provided at the rate of two per cent upon the basis of its net income as herein computed for the next preceding fiscal or calendar year.

"Sec. 3. *Basis on business within the state.*—If the entire business of the corporation be transacted within the state the tax imposed shall be based upon the entire net income of such corporation for such fiscal or calendar year. If the entire business of the corporation be not transacted within the state and its gross income derived from business done both within and without the state, the determination of its net income shall be based upon the business done within the state and for the purpose of computing such net income the commissioner of taxes shall adopt such recommendations and regulations for the allocation of net income as will fairly reflect the net income of that portion of the business done within the state." (p. 37.)

IV. Date of Judgment and Date of Application for Appeal.

The judgment sought to be reversed was entered on November 7, 1934. The application for appeal is presented on February 4, 1935.

V. Nature of the Case and of the Rulings of the Supreme Court of the State of Vermont.

The nature of the case is as follows:

James C. Colgate, the appellant, a resident and citizen of Bennington, Vermont, who was, throughout the year 1931,

a married individual living with his wife, and who derived income from the ownership of or interest in stocks, bonds, notes and other interest bearing securities and otherwise, seasonably filed an individual income tax return for the calendar year 1931 showing a tax of $7,176.13, accompanied by a payment of one-quarter of the tax indicated thereby, and a written protest against the requirement of such return and the collection of such tax. He subsequently paid the balance of said tax under like protest.

1. Included in said tax of $7,176.13 was a tax at the rate of four per cent on income amounting to $130,875.39 received by said James C. Colgate in the year 1931 as dividends or parts thereof on stocks of corporations, the income of which was in whole or in such parts not subject to taxation as against said corporations at the rate of two per cent under Part II of said Public Act No. 17 because earned *without* the State of Vermont, while no tax was imposed under said Public Act No. 17 upon the amounts received as dividends or parts thereof on stocks of corporations, the income of which was in whole or in such parts subject to taxation as against said corporations at the rate of two per cent under Part II of said Act because earned *within* the State of Vermont.

2. There was also included in said tax of $7,176.13 a tax at the rate of four per cent. on income amounting to $25,945, received by said James C. Colgate in the year 1931 as interest on account of money loaned without the State of Vermont at a rate of interest not exceeding five per cent. per annum upon obligations of the classes enumerated by said Public Act No. 17, in Part I, Sec. 3, Par. Second, Subd. (a) thereof, while no tax was imposed under said Public Act No. 17 upon the amounts received as interest on account of money so loaned within the State of Vermont, bearing such interest and evidenced by such obligations.

3. There was also included in said tax of $7,176.13, a tax at the rate of four per cent. per annum on income amounting to $21,927.77 received by said James C. Colgate in the year 1931 as interest on account of money loaned without the State of Vermont at a rate of interest exceeding five per cent. per annum upon obligations of the classes enumerated by said Public Act No. 17 in Part I, Sec. 3, Par. Second, Subd. (a) thereof, while no tax was imposed under said Public Act No. 17 upon the amounts received as interest on account of money so loaned within the State of Vermont, bearing interest at a rate not exceeding five per cent. per annum and evidenced by such obligations.

4. There was also included in said tax of $7,176.13 a tax at the rate of four per cent. per annum on $800 of income derived from his ownership of and interest in stocks, bonds, notes, and other interest bearing securities, which $800 of income would have been, as a personal exemption, eliminated from taxation by Section 3 of said Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, if he had not received any income other than that derived from said sources.

On August 27, 1932, pursuant to Section 26, Part I, of said Public Act No. 17, he made application to the Commissioner of Taxes of the State of Vermont for a revision of such tax on the ground, among others, that his privileges and immunities as a citizen of the United States and a citizen of the State of Vermont had been abridged, and he was being deprived of his property without due process of law and he was being denied the equal protection of the laws and that interstate and foreign commerce was being interfered with in violation of the provisions of the Constitution of the United States by said Public Act No. 17, in that,

1. Said law classified and taxed at four per cent. per annum that part of his income for the year 1931 from stocks

of corporations so as to impose a greater burden upon his acquisition, possession and enjoyment of stocks of corporations which do all, or part, of their business outside the State of Vermont, amounting to $130,875.39, than is imposed upon the acquisition, possession and enjoyment of stocks of corporations which do all, or a corresponding part, of their business in the State of Vermont.

2. Said law classified and taxed at four per cent. per annum that part of his income for the year 1931 derived from interest on money loaned without the State of Vermont at not exceeding five per cent. per annum evidenced by obligations of the classes enumerated by said Public Act No. 17 in Part I, Sec. 3, Par. Second, Subd. (a) thereof, amounting to $25,945 and imposed no tax in case of such a loan of money at the same rate of interest within the State of Vermont.

3. Said law classified and taxed at four per cent. per annum that part of his income for the year 1931 derived from interest on money loaned either within or without the State of Vermont at a rate exceeding five per cent. per annum evidenced by obligations of the classes enumerated by said Public Act No. 17 in Part I, Sec. 3, Par. Second, Subd. (a) thereof, amounting to $21,927.77 and imposed no tax upon the amounts received as interest on account of money so loaned within the State of Vermont bearing interest at a rate not exceeding five per cent. per annum and evidenced by such obligations.

4. Said law taxes $800 of that part of his income derived from his ownership of and interest in, stocks, bonds, notes and other interest bearing securities, but would have eliminated the tax upon said $800 of income (as a personal exemption), if he had not received any income other than that derived from said sources.

Said application resulted in a decision of the said Tax Commissioner that the tax assessed, as shown by the return on file, was not excessive and was correct and resettling and computing such tax at the sum so shown.

On March 1, 1933, pursuant to Section 27, Part I, of said Public Act No. 17, said James C. Colgate filed his petition in the Washington County Court of the State of Vermont, asking, among other things, that the taxes, interest or penalties illegally assessed as aforesaid, be ordered refunded to him with interest, and that judgment be entered accordingly, upon the constitutional grounds hereinbefore set forth and upon other grounds. Said petition was heard on an agreed statement of facts, which comprehended all matters of fact alleged in the petition and application and the full payment of said tax under protest, and also on the argument of plaintiff's counsel, and resulted in a judgment for the defendant.

On February 15, 1934, said James C. Colgate brought his petition before the Supreme Court of the State of Vermont for a review and final decision of the said questions of constitutional law and other questions of law by said Supreme Court on his bill of exceptions, each and every of which exceptions was overruled by said County Court. Said bill of exceptions contained exceptions to said judgment of the County Court upon the constitutional objections hereinbefore specified as well as other exceptions.

At a General Term of the said Supreme Court begun and held at Montpelier, Vermont, on the first Tuesday of November, A. D. 1934, said Supreme Court made and entered a final judgment affirming the said judgment of the County Court.

The final judgment of said Supreme Court of the State of Vermont affirming said judgment of said County Court against said James C. Colgate was a ruling by the highest court of said State of Vermont in which a decision in said

suit then could, or now can be had, in favor of the validity of said Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, the validity of which, on the ground of its being repugnant to the Constitution of the United States, had been drawn in question by said exceptions to the judgment of said County Court upon the constitutional grounds hereinbefore set forth.

In its opinion (*Colgate* v. *Harvey*, 175 Atlantic Reporter 352, not yet officially reported), the Vermont Supreme Court stated the grounds upon which the constitutionality of said Public Act No. 17 was challenged as follows:

> "(1) That it contravenes section 2 of article 4 of the Federal Constitution, which provides that the citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states.
>
> "(2) That it infringes the Fourteenth Amendment to that Constitution, which provides that no state shall deprive any person of life, liberty, or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws.
>
> "(3) That it violates articles 1 and 7 of our Bill of Rights, which, speaking broadly, provide for the equality of individuals before the law.
>
> "(4) That it results in an unwarranted interference with interstate commerce.
>
> "(5) That it attempts to tax the income from dividends on stock in foreign corporations which is tantamount to a tax on the stock itself which has a taxable situs beyond the jurisdiction of this state."

The opinion then states that the court found nothing in the statute that conflicts with the state or federal constitutions.

VI. Cases Believed to Sustain the Jurisdiction of the Supreme Court of the United States.

Cases Condemning State Taxation Discriminating Against Investment in Sister States.

The appellant here is a citizen of the United States and of Vermont. By the Act called into question, Vermont levies an income tax which, in effect, taxes dividends earned outside of Vermont and exempts dividends earned within Vermont,[1] and which also, in effect, taxes income from loans made outside of Vermont at not exceeding five per cent interest and exempts income from loans within Vermont at not exceeding five per cent interest.[2]

The appellant's position is that these provisions of the Act deprive citizens of the United States and of Vermont of the right to which they are entitled under Article IV, Section 2, of the Constitution and the Fourteenth Amendment and the Commerce Clause, to invest in non-Vermont stocks and bonds on at least as favorable terms as in Vermont stocks and bonds.

What Vermont has done in substance is to announce that income over which Vermont has territorial jurisdiction shall be tax free and income over which Vermont has no territorial jurisdiction, but only a jurisdiction through the residence of the owner, shall be taxed. Of all the classifications that might have been chosen for the purposes of taxation, the most clearly unconstitutional is that which exempts intra-state income and taxes extra-state income.

In *Chalker* v. *Birmingham & N. W. Ry. Co.*, 249 U. S. 522, 527, there was involved the constitutionality of a stat-

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[1] Pt. I, § 3, Par. Second and Subd. (d) thereof and Pt. II, § 3.

[2] Pt. I, § 3, Par. Second and Subd. (a) thereof.

ute of the State of Tennessee, which imposed an annual tax for the privilege of doing work within the state, amounting to $25 if the chief office of the person or corporation doing the work was in the State of Tennessee, and to $100 if it were not. The United States Supreme Court held that the statute was unconstitutional on the ground that it violated Section 2 of Article IV of the Constitution. In other words, the case held that under Section 2 of Article IV of the Constitution, a state cannot discriminate against citizens of other states by making the location of the principal place of business within or without the state the deciding factor in determining whether the tax for exercising privileges within the state shall be the minimum or the maximum. In that case, the statute made the residence of the taxpayer the determining factor as between the imposition of the tax of $25 or the tax of $100 each of which it had jurisdiction to levy.

It is submitted that the Fourteenth Amendment contains an equally effective prohibition against making the extra-state source of income the basis of discrimination against it in income taxation.

An application of the Fourteenth Amendment somewhat similar to that here suggested was made in *F. S. Royster Co.* v. *Virginia,* 253 U. S. 412, 416. In that case, the United States Supreme Court held that a state law, which taxed all income of local corporations doing business both outside and inside the state but exempted all income of local corporations doing business outside the state only, was arbitrary and violated the equal protection clause of the Fourteenth Amendment.

The discrimination in that case favored extra-state business and involved only a domestic corporation, the creature of the taxing state. Yet it was condemned as unconstitutional. In the case at bar, the discrimination favors business within the state and discriminates against a natural

person. It is submitted that the discrimination in the case at bar is *a fortiori* unconstitutional.

In *Klein* v. *Board of Supervisors,* 282 U. S. 19, 23, where the claim was made that the statute discriminated against extra-state business, the United States Supreme Court answered that what at first appeared to be discrimination was substantially justified. However, the Court in so holding laid down a rule for determining whether such apparent discrimination is justified.

In that case, the United States Supreme Court sustained a Kentucky statute which taxed shares of corporations in the hands of the shareholder. The statute exempted the shares of those corporations which paid taxes to Kentucky on at least 75% of their total property. In sustaining the tax, Mr. Justice Holmes said at pages 23-24:

> "If the corporation having all its property in the state has paid taxes upon the whole, usually it would be just not to tax the stockholders in respect of values derived from what already has borne its share. And what would be true in the case supposed would be true when the corporation was paying for the great body of its property although some small fraction happened to be outside of the state. Thus we come to the usual question of degree and of drawing a line where no important distinction can be seen between the nearest points on the two sides, but where the distinction between the extremes is plain. • • •
>
> "We agree with the Court of Appeals that there could have been no question if the statute had said ninety per cent and that fixing seventy-five was equally plainly 'a reasonable effort to do justice to all in view of the way all our other assessments are made'."

In the case at bar, the so-called income tax upon dividends is a flat tax of four per cent.[3] There is a franchise

[3] Pt. I, § 3, Par. Second.

tax on corporations (under Part II of the Act) amounting to two per cent of the net income of the corporation from business done within the State of Vermont.[4]

The Kentucky tax was sustained in the above quoted *Klein* case on the theory that exemption of stockholders from taxation on their stock may be justified by showing that "all but a small fraction of" the property represented by the stock "already has borne its share" of the support due the state by being taxed in the hands of the corporation. In that case, it might be said in substance that 75% of the property represented by the stock had already borne its share of Kentucky taxation so that it was substantially fair to exempt the whole in the hands of the stockholder. The property had borne 75% of its burden and the Legislature in deciding the question of degree was held to be within constitutional limitations in treating it as though it had borne its entire burden.

In the case at bar, however, even if we should regard the tax on the net income of the corporation and the tax on the dividends paid the stockholders as taxing the same property, that property has borne but 50% of its burden in the hands of the corporation for the income tax is four per cent. and the corporation tax is but two per cent. The justification for the territorial discrimination in the *Klein* case—the fact that the property had already borne 75%, or "all but a small fraction" of its burden—is not available here. The property here has, at most, borne 50% of its burden.

If the *Klein* case should be deemed to sustain territorial discrimination where the property had, as here, borne but 50% or its burden, the case at bar would then raise the question whether the rule of the *Klein* case still has validity in view of the subsequent decision of the United States Su-

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[4] Pt. II, §§ 2 & 3.

preme Court in *First National Bank* v. *Maine,* 284 U. S. 312, 328. That case applied the rule of single situs for intangible property to shares of stock. The United States Supreme Court has not yet decided whether that principle brings cases such as the case at bar within the rule of *Frick* v. *Pennsylvania,* 268 U. S. 473, 494-495, that the State cannot measure taxes by matters beyond its jurisdiction.

The Commerce Clause furnishes another basis for invalidity of the statute here involved, particularly with respect to the tax upon interest from loans made outside of Vermont where there is no corresponding tax upon interest from loans made within Vermont. Looking at the question realistically, this tax situation discourages Vermont residents from making loans outside of Vermont and thus aproximates an embargo upon the exportation of capital from Vermont into other States. The decisions of the United States Supreme Court condemn any "burden upon the occupation or the privilege of carrying on (interstate) commerce, whatever may be the instrumentalities or means employed to that end." (*New Jersey Telephone Co.* v. *Tax Board,* 280 U. S. 338, 346.)

Case Condemning the Rate of Interest as a Basis for Discriminating Between Taxable and Tax Exempt Property.

The statute in the case at bar, beside taxing all interest earned outside of Vermont, taxes all interest earned within Vermont at a rate in excess of five per cent.[5]

The use of a variation in the interest rate as a basis for tax classification has been condemned. (*Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32.)

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[5] Pt. I, § 3, Par. Second and Subd. (a) thereof.

Case Condemning the Arbitrary Refusal of the $800 *Exemption.*

The statute under consideration deals with two classes of income which it defines: First, what may be referred to as earned income[6] and, second, income from investment.[7] An exemption of $800, is applicable against the investment income *but only if there is no earned income.*[8] No justification for this extraordinary provision has been found. As a basis for classification for tax purposes, it is as arbitrary as the difference in rates of interest which in *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32 (*supra*) was held to be an unconstitutional basis.

Cases Holding That Appeal Is the Proper Remedy.

Safe Deposit and Trust Company of Baltimore v. *Virginia*, 280 U. S. 83.

Baldwin et al. v. *Missouri*, 281 U. S. 586.

Dated: January 31, 1935.

JAS. C. COLGATE,
Appellant,
GEORGE L. HUNT,
E. J. DIMOCK,
Attorneys for Appellant.

[6] Pt. I, § 3, Par. First.
[7] Pt. I, § 3, Par. Second.
[8] Pt. I, § 3, Par. Second, Subd. (a) and Subs. Second thereof.

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Supreme Court of the United States

OCTOBER TERM, 1934

No. [redacted] 8

JAMES C. COLGATE,

Appellant,

vs.

ERWIN M. HARVEY, Tax Commissioner of the State of Vermont,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF VERMONT.

APPELLANT'S BRIEF.

E. J. DIMOCK,
Counsel for Appellant.

ALFRED GREGORY,
GEORGE L. HUNT,
of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1934

No. 790

JAMES C. COLGATE,

Appellant,

vs.

ERWIN M. HARVEY, Tax Commissioner of the State of Vermont,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF VERMONT.

APPELLANT'S BRIEF.

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(b) OPINIONS BELOW.

The County Court of Washington County, Vermont handed down no opinion.

The Supreme Court of Vermont handed down an opinion (R. 16-25) which has not yet been officially reported. It is, however, reported as *Colgate* v. *Harvey*, 175 Atl. 352.

(c) GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

A statement as to the jurisdiction of this Court has already been filed in compliance with paragraph 1 of Rule XII and probable jurisdiction was noted by this Court on April 1, 1935.

(d) STATEMENT OF THE CASE.

Preliminary Statement of Questions Involved.

This is an appeal under Judicial Code, Section 237, Subdivision (a), from a judgment of the Supreme Court of the State of Vermont, upholding the validity of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the "Income and Franchise Tax Act of 1931".

The appellant, a citizen and resident of Vermont, during the year 1931 received interest upon money loaned outside of the State of Vermont at rates of not more than 5% per annum and received dividends upon the stock of corporations doing business outside of the State of Vermont. Under the Act in question an income tax of 4% was imposed upon such interest and upon a part of such dividends proportionate to the income of the corporations earned outside the State of Vermont. At the same time those who received interest upon money loaned *within* Vermont at not more than 5% per annum or dividends from stock of corporations doing all of their business *within* Vermont were

not required by the said statute to pay any income tax. In this respect the statute is challenged as discriminatory and invalid because contrary to the provisions of the United States Constitution which forbid the states to abridge the privileges and immunities of citizens of the United States, to deprive any person of life, liberty or property without due process of law or to deny to any person within their jurisdiction the equal protection of the laws, and contrary to those provisions which vest in Congress the exclusive power to regulate commerce among the several states.

The statute is also attacked as discriminatory in that it deprived the appellant of the benefit of an exemption of $800. which was given to persons who, unlike him, derived all of their income from investments and received none from any business.

History of the Case.

The appellant filed his individual income tax return for the calendar year 1931, indicating a tax payable under the terms of said Public Act No. 17 of 1931, amounting to $7,176.13 (R. 6A-6B), accompanied by a payment of one-quarter of the tax indicated thereby, and his written protest against the requirement of such return and the collection of such tax, upon the constitutional grounds above outlined and other grounds (R. 7).

On August 27, 1932, pursuant to the statute (Public Act No. 17 of 1931, Sec. 26, Pt. I) he made application to the Commissioner of Taxes for a revision of such tax (R. 8-13) which resulted in a decision of the Tax Commissioner confirming the correctness of the tax indicated by the return (R. 13).

On March 1, 1933, pursuant to the statute (Sec. 27, Pt. I), he brought his petition to the Washington County Court of the State of Vermont for relief upon the constitutional grounds above outlined among others (R. 3-5). This petition was heard on an agreed statement of facts (Stipula-

tion, R. 14) which comprehended all matters of fact alleged in the application for revision and in the petition, and added the fact of the payment of the full tax under protest (R. 14).

This resulted on February 15, 1934, in a judgment of the Washington County Court upholding the Tax Commissioner without opinion (R. 14).

The appellant took the case to the Supreme Court of Vermont on exceptions, raising the constitutional questions above outlined among others (R. 1, 3, 15-16), and on November 7, 1934, the judgment of the Washington County Court was unanimously affirmed (R. 16). The Vermont Supreme Court rendered an opinion printed at pages 16-25 of the Record, and reported at 175 Atl. 352, expressly passing upon all of the constitutional questions above outlined.

The appellant has brought the case to this Court by appeal under Judicial Code Section 237, Subdivision (a), as amended, and this Court on April 1, 1935, noted probable jurisdiction.

The Statute.

Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931, may be found at pages 17-46, inclusive, in the official edition of "Acts and Resolves Passed by the General Assembly of the State of Vermont at the Thirty-First Biennial Session". The pertinent provisions of the said statute are here set out *verbatim* as follows:

Part I.

"Sec. 3. *Rate; Exemptions; Amount.*—A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually, with respect to

"First, his net income as herein defined, after deducting the exemptions provided in this act, at the rate of two per cent; and

"Second, to the income received by him on account of the ownership or use of or interest in any stock, bond, note, agreement or other interest bearing security at the rate of four per cent; provided, however, that the words 'income received by him on account of the ownership or use of or interest in any stock, bond, note, agreement or other interest bearing security' shall not include the following items, which shall be exempt from taxation under this act:

"(a) Interest received on account of money loaned within this state, at a rate of interest not exceeding five per cent per annum evidenced by a promissory note, mortgage on real estate or a bond for a deed, including credits representing the purchase price, or any part thereof, of real estate within this state, sold or transferred, evidenced by a promissory note, mortgage or bond for a deed bearing a rate of interest not exceeding five per cent per annum;

* * * * * * * *

"(d) Dividends on stocks of those corporations which are subject to taxation under Part II of this act; provided, however, that if a corporate franchise tax is not measured by the entire net income of such corporation, then a portion of the dividends paid by such corporation shall be taxable under Part I of this act, and such taxable portion shall be that proportion of the dividend as the income earned by the corporation from business done without the state of Vermont bears to the entire income of the corporation.

"Such taxes shall first be levied, collected and paid in the year 1932 and with respect to the net income received during the calendar year 1931 or during any income year ending during the twelve months ending March 31, 1932.

"(e) In case the income taxed in this section is derived wholly from ownership of or interest in any stock, bond, note or other interest bearing security, there shall be deducted from such income the following exemptions:

"First: In case of a single individual a personal exemption of $400.

"Second: In the case of the head of a family, or a married individual living with husband or wife, a personal exemption of $800; but if either a husband or wife shall receive any income other than that derived from the ownership of or interest in any stock, bond, note or other interest bearing security, then such personal exemption shall not be allowed. A husband and wife living together shall receive but one personal exemption of $800 against their aggregate net income; and in case they make separate returns, the personal exemption of $800 may be taken by either or divided between them" (pp. 18 and 19).

* * * * * * * *

Part II.

"Sec. 2. *Rate.*—For the privilege of exercising its franchise in this state in a corporate or organized capacity, every domestic corporation, and for the privilege of doing business in this state every foreign corporation, liable to tax under this act shall annually pay to this state for the privilege of carrying on or doing business by it within this state, a franchise tax to be measured by its net income to be computed in the manner hereinafter provided at the rate of two per cent upon the basis of its net income as herein computed for the next preceding fiscal or calendar year.

"Sec. 3. *Basis on business within the state.*—If the entire business of the corporation be transacted within the state the tax imposed shall be based upon the entire net income of such corporation for such fiscal or calendar year. If the entire business of the corporation be not transacted within the state and its gross income derived from business done both within and without the state, the determination of its net income shall be based upon the business done within the state and for the purpose of computing such net income the commissioner of taxes shall adopt such recommendations and regulations for the allocation of net income as will fairly and justly reflect the net income of that portion of the business done within the state" (p. 37).

Facts.

James C. Colgate, the appellant, is a natural born citizen of the United States. He was throughout the year 1931 a married individual, living with his wife, who derived income from the ownership of or interest in stocks, bonds, notes and other interest bearing securities and otherwise (R. 8, 12). He seasonably filed an individual income tax return for the calendar year 1931, showing a tax of $7,176.13, accompanied by payment of one-quarter of the tax indicated thereby, and a written protest against the requirement of the return and the collection of the tax (R. 8, 6A, 6B, 7). He subsequently paid the balance of said tax under like protest (R. 14).

Included in this tax of $7,176.13, there was a tax of $1,037.80 computed at the rate of 4% on income amounting to $25,945., received by the appellant in the year 1931, as interest on account of money loaned without the State of Vermont at rates of interest not exceeding 5% per annum, upon bonds, notes and other obligations of the classes enumerated by said Public Act No. 17, in Part I, Sec. 3, Par. Second, Subd. (a) thereof, quoted at p. 4, *supra* (R. 8, 9).

The appellant deemed himself aggrieved because it was provided in said subdivision of Public Act No. 17, that no tax was imposed upon amounts received as interest on account of money so loaned within the State of Vermont bearing interest at rates not exceeding 5% per annum and evidenced by such obligations (R. 10).

There was also included in said tax of $7,176.13 a tax of $6,272.81 computed at the rate of 4% on income amounting to $130,875.39, received by the appellant in the year 1931, as dividends, or fractions thereof, on stocks of corporations the income of which, or like fractions thereof, was not subject to taxation as against said corporations at the rate of 2% under Part II of said Public Act No. 17, because earned *without* the State of Vermont (R. 8, 9, 13. Pt. II of the Act quoted at p. 5, *supra*).

The appellant deemed himself aggrieved because it was provided in said Public Act No. 17, in Part I, Sec. 3, Par. Second, Subd. (d), quoted at p. 4, *supra,* that no tax was imposed upon amounts received as dividends, or fractions thereof, on stocks of corporations the income of which, or like fractions thereof, was subject to taxation as against said corporations at the rate of 2% under Part II of said Act, because earned *within* the State of Vermont (R. 8, 9, 13).

There was also included in said tax of $7,176.13 a tax at the rate of 4% per annum on $800. of income derived from the appellant's ownership of and interest in stocks, bonds, notes and other interest bearing securities, which $800. of income would have been, as a personal exemption, eliminated from taxation by Par. Second of Subd. (e) of said Section 3 if he had not received any income other than that derived from said sources (R. 8, 11. Public Act No. 17, Sec. 3, Par. Second, Subd. (e), Subs. Second, quoted at p. 5, *supra*).

The appellant then unsuccessfully sought before the Tax Commissioner and in the courts of Vermont, including the Supreme Court, the highest court of said state in which a decision then could or now can be had, among other things, for a determination that said Public Act No. 17 was invalid on the ground of its being repugnant to the Constitution of the United States in that it abridged his privileges and immunities as a citizen of the United States, deprived him of his property without due process of law, and denied him the equal protection of the laws, contrary to the Fourteenth Amendment of the United States Constitution, and interfered with interstate commerce, contrary to Article I, Section 8 of the United States Constitution.

(e) ASSIGNED ERRORS INTENDED TO BE URGED.
1a, 1c, 1d and 1e.

The said Court (Supreme Court of the State of Vermont) erred in ruling that the provisions of Public Act No. 17 of the Public Act of 1931 of the State of Vermont, known

as the Income and Franchise Tax Act of 1931, which imposed a tax at the rate of 4% on income amounting to $130,875.39 received by the appellant in the year 1931 as dividends or parts thereof on stocks of corporations the income of which was in whole or in such parts not subject to taxation as against such corporations at the rate of 2% under Part II of said Public Act No. 17 because earned without the State of Vermont, but imposed no tax upon the amounts received as dividends or parts thereof on stocks of corporations the income of which was in whole or in such parts subject to taxation as against such corporations at the rate of 2% under Part II of said Act because earned within the State of Vermont,

Did not abridge said appellant's privileges and immunities as a citizen of the United States in violation of the Fourteenth Amendment of the Constitution of the United States, (1a.)

Did not deprive said appellant of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, (1c.)

Did not deny said appellant the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States, (1d.)

Did not interfere with interstate or foreign commerce in violation of Section 8 of Article I of the Constitution of the United States. (1e.) (R. 29-31).

2a, 2c, 2d and 2e.

The said Court erred in ruling that the provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931, which imposed a tax at the rate of 4% on income amounting to $25,945.00 received by the appellant in the year 1931 as interest on account of money loaned without the State of Vermont, or on account of credits representing the purchase price in whole or in part of real estate without the State of Vermont, bearing interest at a rate of not

exceeding 5% per annum, and evidenced by a promissory note, mortgage on real estate or a bond for a deed, but imposed no tax on income received as interest on account of such a loan within the State of Vermont, or on account of such a credit with respect to real estate within the State of Vermont, bearing such interest and evidenced by such obligations,

Did not abridge said appellant's privileges and immunities as a citizen of the United States in violation of the Fourteenth Amendment of the Constitution of the United States, (2a.)

Did not deprive said appellant of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, (2c.)

Did not deny said appellant the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States, (2d.)

Did not interfere with interstate or foreign commerce in violation of Section 8 of Article I of the Constitution of the United States. (2e.) (R. 31-33).

4d.

The said Court erred in ruling that the provisions of Public Act No. 17 of the Public Acts of 1931 of the State of Vermont, known as the Income and Franchise Tax Act of 1931, which imposed a tax at the rate of 4% on $800. of income derived by the appellant from his ownership of and interest in stocks, bonds, notes and other interest bearing securities, but which, by Section 3 of said Public Act No. 17, would have eliminated said $800. of income from taxation, as a personal exemption of a married individual living with his wife, if he had not received any income other than that derived from said sources,

Did not deny said appellant the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States. (R. 37).

(f) ARGUMENT.

In this Court the appellant presents the following points:

Point I.

Public Act No. 17 in effect taxes interest and dividends earned outside of Vermont and exempts interest and dividends earned within Vermont. It is therefore unconstitutional under the Fourteenth Amendment of the United States Constitution.

Subd. 1. The Statute is *prima facie* unconstitutional.

Subd. 2. The attempted justifications do not sustain the Statute.

Point II.

Public Act No. 17, by discriminating against investment by Vermont residents in no-Vermont stocks and loans, in effect creates an embargo upon the export of capital. It is therefore unconstitutional under the Commerce Clause, Article I, Section 8, of the United States Constitution.

Point III.

The taxes involved cannot stand if the discriminatory exemptions are stricken from the statute as unconstitutional.

Point IV.

Public Act No. 17, by arbitrarily refusing to the appellant the $800. exemption given to other persons whose situation differed from his only in that they had no income from business, denies the appellant the equal protection of the laws. It is therefore unconstitutional under the Fourteenth Amendment of the United States Constitution.

Conclusion.

The judgment of the Supreme Court of Vermont should be reversed and the cause remanded with instructions to annul the assessment of the appellant's tax and to cause the same to be refunded to him.

POINT I.

Public Act No. 17 in effect taxes interest and dividends earned outside of Vermont and exempts interest and dividends earned within Vermont. It is therefore unconstitutional under the Fourteenth Amendment of the United States Constitution.

Subd. 1. The Statute is prima facie unconstitutional.

Pertinent provisions of the Vermont Income and Franchise Tax Act of 1931 are given on pages 3 to 5, *supra.*

It is divided into two parts, Part I and Part II. Part I imposes an income tax on individuals, and Part II imposes a franchise tax on corporations measured by net income.

Part I imposes, in addition to an income tax on income from business, known as "net income", an income tax at the rate of 4% on residents of Vermont upon interest and dividends (Sec. 3, pp. 3-4, *supra*). The Act then proceeds to make two exemptions. The first exempts interest on Vermont loans which do not bear interest at more than 5% per annum[1]. It then exempts an amount of dividends upon the stock of any corporation proportionate to the amount of income upon which the corporation is subject to franchise tax under Part II of the Act[2]. The corporation is taxable under Part II of the Act at the rate of only 2% and then only upon income earned in Vermont[3].

The net effect of this part of the Act therefore is to exempt from this 4% tax interest on money loaned at a rate not exceeding 5% per annum in Vermont and dividends proportionate to profits which the corporation earned in Vermont, and to subject to the 4% tax only such interest on money loaned at a rate less than 5% as is earned upon money loaned outside of Vermont, and only such dividends

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[1]Pt. I, Sec. 3, Par. Second, Subd. (a) thereof.
[2]Pt. I, Sec. 3, Par. Second, Subd. (d) thereof.
[3]Pt. II, Secs. 2, 3 thereof.

as are proportionate to profits which the corporation earns outside of Vermont.

Our position is that these provisions of the Act deprive citizens of the United States of the right to which they are entitled under the Fourteenth Amendment to invest in non-Vermont loans and stocks on at least as favorable terms as they are permitted to invest in Vermont loans and stocks.

Section 1 of the Fourteenth Amendment of the Constitution of the United States reads:

> "Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Capricious classifications for purposes of taxation are held invalid as denying to persons the equal protection of the laws. (See, as an instance, *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32 (1928, *infra*)).

A conclusion that a classification is not capricious is, however, not enough to save it under the equal protection clause. The object of the classification must be legitimate. A statute taxing foreign corporations at a higher rate than similarly situated domestic corporations is void under the equal protection clause even though corporations cannot, like natural persons, be citizens and thus entitled to the protection afforded citizens by the Constitution. In *Hanover Insurance Co.* v. *Harding*, 272 U. S. 492 (1926), the State of Illinois taxed foreign insurance companies on net receipts when domestic insurance companies were required to pay no taxes on such net receipts. The rate of tax on net receipts was much higher than the rate which domestic insurance companies paid on their property and was therefore held unconstitutional under the equal pro-

tection clause. The unanimous opinion of this Court was expressed on that branch of the case by Mr. Chief Justice Taft at page 516 as follows:

> "Under the previous decisions of the Supreme Court of Illinois, when the net receipts were treated as personal property and the assessment thereon as a personal property tax subjected to the same reductions for equalization and debasement, it might well have been said that there was no substantial inequality as between domestic corporations and foreign corporations, in that the net receipts were personal property acquired during the year and removed by foreign companies out of the State, and could be required justly to yield a tax fairly equivalent to that which the domest' companies would have to pay on all their personal property, including their net receipts or what they were invested in. It was this view, doubtless, which led to the acquiescence by the state authorities and the foreign insurance companies in such a construction of § 30, and in the practice under it. But an occupation tax imposed upon 100 per cent. of the net receipts of foreign insurance companies admitted to do business in Illinois, is a heavy discrimination in favor of domestic insurance companies of the same class and in the same business, which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 60 per cent. of the full value of that property. It is a denial of the equal protection of the laws."

Still more clearly repugnant to the Fourteenth Amendment, however, is a classification for purposes of taxation which not only has no legitimate object but is deliberately designed to abridge a privilege of a citizen of the United States. For example, a classification which might not be so oppressive as to be unconstitutional under the equal protection clause alone might be unconstitutional if, in addition to lacking any sound foundation in justice, it also discriminated against a privilege of a citizen of the United States.

As was said by Mr. Justice Butler in *Hamilton* v. *Regents of the University of California*, 293 U. S. 245, 261 (1934):

> "The 'privileges and immunities' protected are only those that belong to citizens of the United States as distinguished from citizens of the States—those that arise from the Constitution and laws of the United States as contrasted with those that spring from other sources."

The concept of privileges of citizens of the United States is one which has developed since the foundation of the Republic. It is even said that prior to the adoption of the Fourteenth Amendment there were no citizens of the United States. (*Sharon* v. *Hill*, 26 Fed. 337, 343 (Circuit Court, D. Cal. 1885)). Before the result of the Civil War had more closely welded the Union into a single nation, statesmen were much more deeply concerned with preventing states from abridging the due privileges of citizens of other states than with preventing them from abridging the due privileges of citizens of their own who later came to constitute members of the class of citizens of the United States.

Article IV, Section 2, of the United States Constitution as originally adopted provided that the citizens of each state should be entitled to all the privileges and immunities of citizens in the several states. Under that clause, citizens of other states were able to come into Vermont and invest their funds upon equal terms with the citizens of Vermont without interference by its legislature. (See *Chalker* v. *Birmingham and Northwestern Railway Co.*, 249 U. S. 522 (1919), *infra*).

Upon the adoption of the Fourteenth Amendment citizens of Vermont became *ipso facto* citizens of the United States as well and it is our position that they thereby became entitled to go into other states and invest their funds without being subjected by the legislature of Vermont to any greater burdens than it placed upon their investment of money within its borders.

The states were originally required to give to the citizens of other states the privileges accorded their own citizens. By the Fourteenth Amendment they were required to give to their own citizens such rights as were necessary for the enjoyment of the status of a citizen of the United States.

There can be no doubt that the right to employ funds in any state of the Union on equal terms with citizens of that state and unhampered by restrictions imposed by the state of which the investor is a citizen is one of the essential rights of citizenship in the United States. If we have no such right, the citizenship in the United States created by the Fourteenth Amendment was a citizenship subject to the sovereignty of the states over their citizens. That cannot be. If there is a paramount sovereign of the citizen, it is the United States.

State lines are used by Public Act No. 17 as the basis of a classification hostile to investment in enterprises in sister states. What the state has done in effect is to announce that income over which Vermont has territorial jurisdiction shall be tax free and income over which Vermont has no territorial jurisdiction, but only a jurisdiction through the residence of the owner, shall be taxed. This is not the usual case of a classification invalid because capricious and without logical basis. Its basis is extremely logical but wholly vicious and repugnant to the Fourteenth Amendment and to the whole theory of our union of states. Of all the classifications that might have been chosen for the purposes of taxation, the most clearly unconstitutional is that which exempts intra-state income and taxes extra-state income.

It is settled that the right to do business upon payment of a certain amount as a privilege tax is one of the privileges and immunities of the citizens of the state levying the tax which is assured to citizens of other states by Article IV, Section 2, of the United States Constitution, providing that the citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. That

was the holding in *Chalker* v. *Birmingham and Northwestern Railway Co.*, 249 U. S. 522 (1919, *supra*). In that case there was involved the constitutionality of a statute of the State of Tennessee imposing an annual tax for the privilege of doing work within the state, which amounted to $25 if the chief office of the person or corporation doing the work were in the State of Tennessee, and to $100 if it were not. This Court held that the statute was unconstitutional on the ground that it violated Section 2 of Article IV of the Constitution, since it was a fair presumption that the person whose chief office was in the State of Tennessee and who had to pay $25 would be a citizen of Tennessee, and that the person whose chief office was not within the State of Tennessee and who had to pay $100 would not be a citizen of Tennessee. Mr. Justice McReynolds in delivering the Court's unanimous opinion said at page 527:

> "As the chief office of an individual is commonly in the State of which he is a citizen, Tennessee citizens engaged in constructing railroads in that State will ordinarily have their chief offices therein, while citizens of other States so engaged will not. Practically, therefore, the statute under consideration would produce discrimination against citizens of other States by imposing higher charges against them than citizens of Tennessee are required to pay. We can find no adequate basis for taxing individuals according to the location of their chief offices—the classification, we think, is arbitrary and unreasonable. Under the Federal Constitution a citizen of one State is guaranteed the right to enjoy in all other States equality of commercial privileges with their citizens; but he cannot have his chief office in every one of them."

The holding of the *Chalker* case was that under Section 2 of Article IV of the Constitution a state cannot discriminate against citizens of other states by making the location of one's principal place of business within or without the state the deciding factor in determining whether the tax for exercising privileges within the state shall be the minimum or the maximum.

Where, as in the case at bar, a state discriminates not against citizens of another state but against such of its own citizens as invest in other states, it is submitted that the Fourteenth Amendment constitutes an equally effective protection. The citizen is not only denied the equal protection of the laws but his privileges and immunities as a citizen of the United States are abridged.

In most of the cases where it has been urged that statutes are unconstitutional because of discriminatory classification, the attack has been based upon the equal protection clause. As early as 1912, the equal protection clause was invoked in a case much like the case at bar, with the question left undecided because the plaintiff was not a member of the class alleged to have been discriminated against in the classification. The case was *Darnell* v. *Indiana*, 226 U. S. 390 (1912). There an individual held shares in a Tennessee corporation and the State of Indiana taxed the shares as those of a foreign corporation but at the same time exempted the shares of domestic corporations when their property was taxed to the corporation itself. This Court held that the owner of shares in a foreign corporation could not complain unless he was less favorably treated than the owner of shares in a similarly situated domestic corporation and that the Tennessee corporation was treated precisely like an Indiana corporation which had no property in Indiana. The question of the validity of the statute as taxing the shares of foreign corporations which had property within Indiana and exempting the shares of domestic corporations which had property within Indiana was expressly reserved, Mr. Justice Holmes using the following language in the Court's unanimous opinion (p. 398):

> "The case is pretty nearly disposed of by *Kidd* v. *Alabama*, 188 U. S. 730, where the real matter of complaint, that the property of the corporation presumably is taxed in Tennessee, is answered. See also *Wright* v. *Louisville & Nashville R. R. Co.*, 195 U. S. 219, 222. But it is said that the former decision does

> not deal with the objection that the statutes work a discrimination against stock in corporations of other States contrary to principles often recognized. *I. M. Darnell & Son Co.* v. *Memphis*, 208 U. S. 113. The most serious aspect of this objection is that the statutes of Indiana do not make allowance if a foreign corporation has property taxed within the State. But as to this it is enough to say that, however the statutes may be construed in a case of that sort, the plaintiffs in error do not show that it is theirs, and that as they do not belong to the class for whose sake the constitutional objection would be given, if it would, they cannot complain on that ground."

Thus a question very like that raised in the case at bar was reserved by this Court as presenting a "serious aspect" of "the objection that the statutes work a discrimination against stock in corporations of other States" contrary to the equal protection clause.

In 1920, however, this Court decided a case which seems to us to have gone so much farther than a decision against the statute in the *Darnell* case, that there can no longer be any doubt of the invalidity of a statute taxing the shares of a foreign corporation and exempting the shares of a similarly situated domestic corporation. The case is *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412 (1920, *infra*). In that case this Court held unconstitutional under the equal protection clause a Virginia statute which taxed domestic corporations on both intra-state and extra-state profits if they did any business within the state but did not tax domestic corporations on their extra-state profits if they did no business within the state. Mr. Justice Pitney, speaking for the Court, said at page 416:

> "Their business (that of domestic corporations doing business both within and without the state) done within the State presumably is of some general benefit to the State, certainly enriches its treasury by the amount of the taxes they pay upon the income derived therefrom; and the imposition upon them under c. 472 of taxes not only upon this income but also

upon income that they derive from business conducted outside of the State (similar income of the favored corporations being exempted) has the effect of discriminating against them for that which ought to operate if at all in their favor. It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation."

The discrimination in that case favored extra-state business and involved only a domestic corporation, the creature of the taxing state. Yet it was condemned as denying the equal protection of the laws. In the case at bar the discrimination favors business within the state and discriminates against a natural born citizen of the United States. It is submitted that the discrimination in the case at bar is *a fortiori* unconstitutional.

Although we have been discussing the case at bar as though the dividends taxed by Public Act No. 17 and the extra-state earnings of the corporation were but different forms of the same thing, we realize that the connection between them is somewhat indirect. The earnings which are made determinative of the taxability of the dividends are the earnings of the corporation made during the year in which the dividends are paid to the shareholder. Of course dividends earned in a year when the corporation lost money outside of Vermont but made money within Vermont may be paid during a year when the situation is reversed. In that event, under the terms of the statute, dividends earned within Vermont would be taxed by the State of Vermont and dividends earned outside would be exempted—a result exactly opposite to that which we have treated as the object of the statute. It may well be, therefore, that there is no sufficient ground for our course in treating the dividend question as though extra-state earnings were taxed and intra-state earnings untaxed. We shall continue to treat it on that assumption, however, for, if that is not the basis of the classification in the statute, it has no factual basis at

all and we need go no farther because it is invalid and unconstitutional as purely arbitrary. (*Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32 (1928, *infra*)).

Subd. 2. The attempted justifications do not sustain the Statute.

The Act on its face taxes out-of-state income and exempts intra-state income. It is clearly unconstitutional unless some special justification peculiar to this case can be established.

The rule with respect to the justification of legislative classifications has recently been thus stated by Mr. Chief Justice Hughes, in an opinion concurred in by the majority of this Court, in *Borden's Company* v. *Baldwin*, 293 U. S. 194, 209 (1934):

> "When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary."

With respect to the classification discriminating in favor of intra-state earned interest and against extra-state earned interest, the only state of facts which can be conceived as a basis for it is that the Legislature decided to encourage the loan of money for use in Vermont business. That argument was relied on by the court below (R. 24). It is submitted that the state of facts supposed will not sustain the classification. In fact, the attack which we make upon the statute is made upon this very ground that its purpose is to favor Vermont business as against out-of-state business.

In *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412 (*supra*), a majority of the justices of this Court held

a statute unconstitutional because it imposed no tax on domestic corporations which did no business within the state but imposed a tax upon domestic corporations which did business both within and without the state. This holding was reached in the face of a dissenting opinion by Mr. Justice Brandeis, in which Mr. Justice Holmes concurred, pointing out that the purpose of the classification may have been to encourage local incorporators to incorporate in Virginia rather than go elsewhere even when they were not going to do business in Virginia.

There, if the minority of the Court were correct in their surmise, the state was discriminating in order to make a profit for the commonwealth through the fees of the office of the Secretary of State. Yet the discrimination was not sustained.

Bethlehem Motors Corporation v. *Flynt*, 256 U. S. 421 (1921), is an example of a case where the tendency of a statute to improve the public finances did not serve to keep the statute from unconstitutionality as discriminating against extra-state business with respect to license fees. The statute required a license tax of $500 for the sale of automobiles within the state to be paid by the manufacturer if the manufacturer were within the state and by the dealer if it were not. This tax might be reduced to $100 in any case where proof was made that the manufacturer of the automobiles had invested three-fourths of its entire assets in bonds of the state or its municipalities or in property located and returned for taxation in the state. The statute was attacked as a palpable discrimination against the automobiles of extra-state manufacturers since none of them were likely to have three-fourths of their assets invested in North Carolina state and municipal bonds or in North Carolina property. This Court held the statute unconstitutional under the Fourteenth Amendment as discriminatory.

With respect to the investment in state and municipal bonds, it was contended in this Court by the State of North Carolina that the condition was so impossible of perform-

ance as to be nugatory both with respect to intra-state and extra-state manufacturers. The State Supreme Court, however, regarded it as a real condition and held it a valid one. On that branch of the case, Mr. Justice McKenna said at page 425 for a majority of this Court:

> "We are unable to concur in this conclusion. It is a perilous power to concede to the State, and it is immediately manifest that it can be exerted to prevent all commerce of those corporations (or other corporations) with the State except as the commerce might be through direct personal purchases and importations. In other words, the power can be exerted to exclude the products of those corporations, and every other corporation, if they have, or it has, agents in the state."

The fact that an automobile manufacturer would undoubtedly be aiding the public finances by investing three-fourths of its assets in North Carolina state and municipal bonds was not even referred to as a possible compensation justifying the discrimination.

If a statute's tendency to improve the business of the state itself cannot justify discrimination, certainly a tendency to improve the business of the inhabitants of the state cannot.

This tendency to improve Vermont business is the only basis of which we can conceive for an attempt to justify the discrimination against interest on extra-state loans. There remains the possibility of justification of the discrimination against dividends upon the stock of corporations doing business wholly or partly without the state.

It is urged against us that what the tax with respect to dividends amounts to is an exemption of dividends from taxation where they represent income which has already borne its quota of the support due the state by being taxed at the rate of 2% in the hands of the corporation. The supposed analogy is the exemption of shares of stock from taxation when the property represented by the shares has already been taxed.

But there are at least two ways in which a tax on the property or income of the corporation may fail to justify exemption of the shares or dividends; first, where the property or income has failed to bear its quota because it was not all taxed, and, second, where it has failed to bear its quota because it was not taxed at as high a rate as the shares or dividends would have been. It is our contention that in the case at bar the 2% tax on the corporate income plainly fails to justify the exemption of the dividends from the 4% tax because the income was not taxed at as high a rate as the dividends would have been.

If all of the corporation's property has been taxed and the tax on the property and on the shares are at the same rate, the property has already borne 100% of its quota of the support due the state and an exemption from tax in the hands of the stockholder would be just. If because of the fact that 75% of the property of the corporation is within the state the property has already borne 75% of its quota of the support due the state, there it might be said that every share of stock held by a stockholder represents an aliquot part of property which has borne 75% of its quota. Under those circumstances it was held in *Klein* v. *Board of Supervisors*, 282 U. S. 19 (1930), that a complete exemption in the hands of stockholders is just, but Justice Holmes reached that result in a unanimous opinion of this Court by first approving a supposed case of an exemption of the shares where 100% of the property had already been taxed in the hands of the corporation, and then adding (p. 23):

> "And what would be true in the case supposed would be true when the corporation was paying for the great body of its property although some small fraction happened to be outside of the State. Thus we come to the usual question of degree and of drawing a line where no important distinction can be seen between the nearest points on the two sides, where the distinction between the extremes is plain."

There can fairly be deduced from the above quoted *Klein* case the rule that there are cases where the property of the

corporation has not borne enough of its quota of the burden due the state to justify the exemption of its shares, and on the other hand, that there are cases where the property of the corporation, while it has not borne the full burden due the state, has yet borne all but a small fraction and thereby justifies the exemption of its shares.

We submit that the discrimination in the case at bar is unjustifiable if justifications for discrimination are to be compared mathematically by saying, "In this case the property has borne all but 25% of the due burden. It has thus borne all but a 'small fraction' of what it should and therefore an exemption of the whole of the shares can be justified," or by saying, "The property has borne all but 75% of its due burden. That is a 'large fraction' and therefore exemption of the stock is not justified."

In the case at bar, even if we should regard the tax on the net income of the corporation and the tax on the dividends paid to the stockholders as taxing the same property, that property has borne but 50% of its burden in the hands of the corporation, for the income tax is 4% and the corporation tax is but 2%. The justification for the territorial discrimination in the *Klein* case—the fact that the property had already borne 75%, or all but a "small fraction" of its burden—is not available here. The property has at most borne 50% of its burden.

That is not the most important point, however. Justice Holmes in the *Klein* case went on to say (pp. 23-24):

> "We agree with the Court of Appeals that there could have been no question if the statute had said ninety per cent and that fixing seventy-five was equally plainly 'a reasonable effort to do justice to all in view of the way all our other assessments are made'."

There are no signs of a reasonable effort to do justice to all in the case at bar. The variation in the rate, making that on dividends of the corporation doing business outside the state double that on the income of a corporation

doing business within the state, is, in the words of Mr. Justice McKenna in *Citizens' Telephone Co. v. Fuller*, 229 U. S. 322, 331 (1913), one of those "clear and hostile discriminations between particular persons and classes" which condemns the statute under the equal protection clause.

The discrimination works inexorably in every case. It is not one of those classifications which sometimes works to the advantage of the inhabitants of the state imposing it and sometimes to the advantage of outsiders, as was the effect of the classification sustained in the *Klein* case. There a holder of the shares of a corporation which had only 76% of its property in Kentucky was better off under the Kentucky tax law than one who held stock in a corporation which had all of its property in Kentucky. In the 76% case the total tax of the corporation and stockholder would be imposed on only 76% of the property and the 24% outside would go untaxed by Kentucky, but in the 100% case the total tax would be based on 100% of the property. There is no chance in the case at bar, however, that the 2% tax on the corporation's income and the 4% tax on the stockholder's dividends, coupled with the exemption of the dividends on the stock of corporations which were subject to the 2% tax, could ever work to the advantage of extra-state business. No matter how the other factors vary the differences in rate will always work in favor of Vermont and against the rest of the Union. And when we consider as well the discrimination against money loaned outside of Vermont, we are justified in concluding that this consistent discrimination against dividends of corporations doing business outside of the state was no mere inadvertence.

We concede that a completely fair system of taxation, giving to shares of stock the benefit of taxes paid by the corporation, cannot be devised. There are cases which have been sustained as devices to avoid double taxation where the rate of tax upon the shares was fixed by the terms of the statute and the rate of tax upon the property of the corporation was different because it depended upon the

rate struck by the local assessors in each taxing district, but none of them exhibited the deliberate hostility to out-of-state affairs shown by the statute in the case at bar. (*Travellers' Insurance Co.* v. *Connecticut*, 185 U. S. 364 (1902, Brewer, J.); *Kidd* v. *Alabama*, 188 U. S. 730 (1903, Holmes, J.); *General American Tank Car Corporation* v. *Day*, 270 U. S. 367 (1926, Stone J.)).

Statutes discriminating against out-of-state enterprises cannot be saved by simply pointing out that the favor given intra-state enterprises is given only when their property is taxed within the state. There must be some logical relation between the tax from which the local enterprise is exempted and the tax which the local enterprise pays. Under the statute in *Bethlehem Motors Corporation* v. *Flynt*, 256 U. S. 421 (1921, *supra*), an automobile manufacturer's license tax would be reduced from $500. to $100. if 75% of the manufacturer's property were located and taxed in North Carolina. The North Carolina Attorney General asserted in this Court that there was no discrimination against foreign manufacturers because they could perform the condition as easily as local manufacturers. Mr. Justice McKenna, speaking for a majority of this Court, replied (p. 426):

> "To this we cannot assent. The condition can be satisfied by a resident manufacturer, his factory and its products in the first instance being within the State; it cannot be satisfied by a non-resident manufacturer, his factory necessarily being in another State, some of its products only at a given time being within the State. Therefore, there is a real discrimination, and an offense against the Fourteenth Amendment, if we assume that the corporations are within the State."

The fact that an automobile manufacturer which invested three-fourths of its assets in property taxable in North Carolina would be contributing heavily in taxes was not even referred to as a possible compensation justifying the discrimination.

We feel that we should not leave this subject without calling attention to the fact that verbally, at least, the attempted justification of the exemption from taxation of income earned within the state runs counter to the doctrine of this Court in *First National Bank* v. *Maine*, 284 U. S. 312 (1932). That case applied the rule of single situs for intangible property to shares of stock and held that the state of incorporation could not subject them to inheritance tax in the estate of a non-resident. Mr. Justice Sutherland, speaking for the majority, said, p. 329, "there is wanting, on the part of a state other than that of the domicile, any real taxable relationship to the event which is the subject of the tax." This Court has not yet decided whether that principle that the state cannot measure taxes by matters beyond its jurisdiction does not limit the State of Vermont to merely taxing all of the income or all of the value of the shares of stock of foreign corporations held by Vermont residents and does not prevent the State of Vermont from taxing so much, but no more, of the shares or the income as represents property and activities outside of its borders.

POINT II.

Public Act No. 17, by discriminating against investment by Vermont residents in non-Vermont stocks and loans, in effect creates an embargo upon the export of capital. It is therefore unconstitutional under the commerce clause, Article I, Section 8, of the United States Constitution.

The Commerce Clause furnishes another basis for invalidity of the statute here involved. This is true with respect to the tax on dividends but is clearest with respect to the tax upon interest from loans made outside of Vermont where there is no corresponding tax upon interest from loans made within Vermont. Looking at the question realistically, this tax situation discourages Vermont resi-

dents from making loans outside of Vermont and thus approximates an embargo upon the exportation of capital from Vermont into other states. While this Court in *Northwestern Life Ins. Co.* v. *Wisconsin,* 247 U. S. 132, (1918, Day, J.) reserved the question whether foreign investment business constituted interstate commerce, we submit that there can be no doubt that it should be answered in the affirmative. The decisions of this Court condemn any "burden upon the occupation or the privilege of carrying on (interstate) commerce, whatever may be the instrumentalities or means employed to that end." (*New Jersey Telephone Co.* v. *Tax Board,* 280 U. S. 338, 346 (1930), from prevailing opinion by Mr. Justice Butler). If all of the states are to be permitted to follow the example of Vermont and tax the income from extra-state investments at higher rates than intra-state ones, the development of one part of the country with capital from another part will be at an end.

POINT III.

The taxes involved cannot stand if the discriminatory exemptions are stricken from the statute as unconstitutional.

The point was made below that all that the appellant complained of with respect to the tax on dividends and the tax on interest on loans was the fact that dividends of corporations doing business inside of Vermont and interest on loans made inside of Vermont were exempted from taxation. It was said that if these exemptions were unconstitutional the statute would still stand and would simply tax the extra-state income and the intra-state income too, so that the appellant would gain nothing. This contention was made and conclusively answered in *Lawrence* v. *State Tax Commission,* 286 U. S. 276 (1932). There the Mississippi income tax law was attacked by a resident individual in the contracting business who earned money in

Tennessee. He based his attack on the ground that it exempted income earned by domestic corporations under the same circumstances. The exemption of corporations had been added by an amendment. The court below had held that even if the statute were discriminatory, that merely struck out the amendment and left corporations and individuals taxed alike so that the plaintiff had properly been required to pay the tax in any event. Mr. Justice Stone, on page 282, in a part of the opinion which was concurred in by all of the Justices, answered that if the statute were discriminatory appellant's constitutional rights were infringed when the tax was levied upon him, and state officers acting under the amendment refrained from assessing the like tax upon his corporate competitors."[1]

POINT IV.

Public Act No. 17, by arbitrarily refusing to the Appellant the $800. exemption given to other persons whose situation differed from his only in that they had no income from business, denies the appellant the equal protection of the laws. It is therefore unconstitutional under the Fourteenth Amendment of the United States Constitution.

The statute under consideration deals with two classes of income which it defines: First, what may be referred to as income from business[2] and, second, income from investment.[3] An exemption of $800 is applicable against the

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[1]While the Court thus held that the appellant was entitled to raise the question, it pointed out that the state had adopted generally a policy of avoiding double taxation of the same economic interest in corporate income by taxing the income to the corporation or the dividends to the stockholders, but not both, and sustained the classification as not having been shown to be without rational basis.

[2]Pt. I, Sec. 3, Par. First.

[3]Pt. I, Sec. 3, Par. Second.

investment income *but only if there is no income from business.*[1] No justification for this extraordinary provision has been found. As a basis for classification for tax purposes, it is as arbitrary as the difference in maturities of the loans which in *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32 (1928, *infra*), was held to be an unconstitutional basis.

One of the strangest things about this $800. exemption is that it is so phrased that in the case at bar the appellant has been forced to trade it for the privilege of taking a loss in his business. The statute refuses to allow the exemption "if either a husband or wife shall receive any income other than that derived from the ownership of, or interest in, any stock, bond, note or other interest-bearing security".[2] The Vermont Supreme Court construed "income" to mean "gross income" and so although the appellant had not received any net income from anything other than the enumerated securities, he was deprived of the exemption because he had received gross income from his business. (R. 25). In this the court sustained the Tax Commissioner, whose official form of return bore the legend "26. Personal exemption (not allowed if in receipt of ANY class A income)." (R. 6A).

In spite of its extraordinary character, this provision, refusing the benefit of the exemption from investment income if there was any income from business, is surprisingly like the condemned provision in *W. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, *supra*, refusing to domestic corporations the benefit of an exemption from income tax on extra-state earnings if they did any business within the state. It was thought by the minority of the Justices in the *Royster* case that there existed in that case the motive of bringing in more revenue to the office of the Secretary of State and that that motive was a sufficient basis for the classification. Here a basis for the classification cannot be even suggested.

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[1] Pt. I, Sec. 3, Par. Second, Subd. (e) and Subs. Second thereof.
[2] Pt. I, Sec. 3, Par. Second, Subd. (e) and Subs. Second thereof.

CONCLUSION.

The judgment of the Supreme Court of Vermont should be reversed and the cause remanded with instructions to annul the assessment of the appellant's tax and to cause the same to be refunded to him.

To us, the provisions discriminating against extra-state activities seem to embody so much of the spirit of the statute that the statute cannot survive their amputation. We do not think that even its severability clause can save it. That clause is quoted below:

> "Sec. 26. *Construction.* If any provisions of this act or application thereof to any taxpayer or circumstances be held invalid, the validity of the remainder of the act and of the application of such provision to any other taxpayer and circumstances shall not be affected thereby."

But even if the remainder of the statute should be held to have life without the provisions taxing dividends and interest earned at rates not exceeding 5%, there would not be enough left to justify any tax against the appellant. A glance at his income tax return (R. 6A) shows that his only income taxable under the original terms of the statute consisted of dividends and interest. Upon a holding that the tax on dividends was unconstitutional, it would, in effect, be stricken from the Act and his liability for that part of the tax would completely disappear. Upon a holding that the tax upon interest earned outside of Vermont at rates not exceeding 5% was unconstitutional, that would also be stricken from the Act and his liability for the tax upon interest earned at those rates would disappear. The exemption of such interest earned within Vermont would, however, stand (see *supra*, pp. 28-29) and all that would be left of the statute would be a tax on all interest earned at rates exceeding 5%.

The provisions of the law taxing interest which would be left—provisions which would tax only such interest as was earned at rates exceeding 5%—would themselves be invalid as a capricious classification of the subjects of taxation. In *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32 (1928, *supra*), the question whether a statute which required a recording fee in the case of the recording of mortgages with a term of five years or more but required none in the case of those with terms of less than five years, was held to deny to the holder of a long term mortgage the equal protection of the laws. The state contended, among other things, that the recording fee was not a tax but this Court answered that recording was so necessary that the fee constituted a tax. In holding the statute discriminatory, Mr. Justice Sutherland said for the majority at page 38:

> "Whether the tax now in question be called a privilege tax or a property tax, it falls in effect upon one indebtedness and not upon another where the sum of each is the same; where both are incurred by corporations or both by natural persons; where the percentage of interest to be paid is the same; where the mortgage security is identical in all respects; where, in short, the only difference well may be that one is payable in 60 months and the other in 59 months. No doubt the state may take into consideration as an element in fixing the *amount* of the tax the time within which the indebtedness is to be paid; for, since the tax is a flat sum covering the entire life of the lien, the privilege of recording the short-time lien and that of recording the long-time lien have different taxable values."

It is true that the Court's opinion pointed out that the exemption did not depend upon a difference between the rates of interest borne by the mortgages which were recorded gratis and by those which were recorded on payment of a fee, but we submit that a distinction between 5% and 5¼% as a basis for exemption or taxability is as arbitrary as the distinction between a maturity of 59

months and one of 60 months. In either case under the doctrine of the *Louisville* case the distinction might be made the basis for a difference in a rate of tax but not for an exemption from taxation.

The statute in the case at bar, therefore, will not serve even to tax the appellant upon the interest earned at rates exceeding 5%.

Respectfully submitted,

E. J. DIMOCK,
Counsel for Appellant.

ALFRED GREGORY,
GEORGE L. HUNT,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1935

No. 8

JAMES C. COLGATE,

Appellant,

vs.

ERWIN M. HARVEY, Tax Commissioner of the State of Vermont,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF VERMONT.

APPELLANT'S BRIEF IN REPLY.

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Difference Between the Positions Taken by the Vermont Supreme Court Below and by the Tax Commissioner in This Court.

The Commissioner's brief goes much farther in argument to justify Vermont Public Act No. 17 of 1931 than the Vermont Supreme Court did and makes one point not anticipated by the appellant's brief.

The Vermont Supreme Court refused to pass upon the Commissioner's argument of equality in support of the exemption from taxation of interest on Vermont loans at not more than 5%, and instead boldly upheld it as a deliberate and proper attempt to keep Vermont money invested in Vermont. Its language was as follows (R. 24):

> "There is no constitutional infirmity in the exemption of five per cent Vermont loans. Opinions of Justices of New Hampshire, supra. The state argues that this is but an extension of a settled state policy. But we prefer to put our decision on the broad ground that a state may, in the interests of thrift and state development, make such reasonable exemptions as this. That it may so encourage its taxpayers to keep Vermont money invested here for the assistance of the agricultural and industrial interests of the state."

The Vermont Supreme Court did not mention the disparity between the 2% tax on intra-state corporate earnings and the 4% tax from which intra-state dividends are exempted but we assume that its justification would be the same—the deliberate legislative purpose of keeping Vermont money invested in corporations earning their dividends in Vermont.

The Vermont Supreme Court's view of the intention of the Legislature is unquestionably correct. The Vermont statute is framed with the obvious deliberate purpose to "encourage its taxpayers to keep Vermont money invested

here for the assistance of the agricultural and industrial interests of the state'' by discouraging them from investing Vermont money elsewhere. The statute encourages taxpayers to invest in Vermont and discourages them from investing elsewhere, by exempting from income tax the interest on 5% loans made in Vermont and the dividends from corporations engaged in business in Vermont and by taxing the interest on such loans made outside of Vermont and the dividends from corporations engaged in business outside of Vermont.

That is the purpose of the statute as admitted by the Vermont Supreme Court. The Commissioner in his brief in this Court (pp. 21-22), beside citing cases and argument intended to support this view of the Supreme Court and to justify a statute designed to discriminate in favor of local investment, goes on to take a completely inconsistent view of the intention of the Legislature and to attempt to justify the statute as the legitimate instrument of that intention.

This inconsistent view of the intention of the Legislature which the Commissioner takes in this Court is that the intention of the Legislature was to bear down equally upon extra-state investment and intra-state investment. Indeed, the Commissioner takes still a third position and says that the burdens carried by intra-state investment are greater than those imposed by the statute upon extra-state investment.* If equality or favor to out of state investment was the intention of the Vermont Legislature, it was so well concealed that it escaped the detection of the Vermont Supreme Court and it certainly escapes our detection.

The Commissioner's attempt to demonstrate that extra-state investment is treated better than intra-state is based upon an argument which was not anticipated in our principal brief. The argument is, in short, that there may be cases where the capital which produces the income which is exempted from tax may have borne an *ad valorem* prop-

*Appellant's brief, p. 26.

erty tax in Vermont and that this justifies the exemption of the income from income tax. The path of reasoning by which it is sought to reach this result is most tortuous, but since the Commissioner in his brief in this Court has attempted to follow it, we perforce must follow him to demonstrate that it does not lead to a justification of the statute. By doing so, however, we do not wish to appear to abandon our position which accords with that of the Supreme Court of Vermont, that the statute is designed to and does place a greater tax burden upon extra-state income than upon intra-state income. Our opponents taunt us with our concession that this intention of the Legislature was an extremely logical one. To our view, a statute which works a discrimination against out-of-state investments with deadly and inescapable logic is more to be condemned than one which works a capricious discrimination because of its lack of logic.

The Commissioner's Attempt to Justify the Exemption of Vermont Interest from Taxation.

The Commissioner's brief first attempts to justify the exemption from taxation of interest on Vermont loans at not more than 5% by invoking the history of the language used in the statute. We are told that that language was once used in a statutory scheme of taxation which contained no illegal discriminations. However, a respectable past is not enough to justify a statute which in its present form works discriminations. The present situation is therefore the only one which we need consider.

As we understand the Commissioner's position as to the present situation, it is that money loaned in Vermont at not exceeding 5% interest *may be** invested in tangible

* There is no foundation to the claim in Footnote 10 on page 18 of the Appellee's Brief that the creditor does not obtain tax exemption on the interest on Vermont loans except where the borrower invests it in Vermont. The Vermont Supreme Court did not so construe the statute. The form supplied by the state (R. 6B) permits the listing of "Interest on Money loaned in Vt. at 5% or less" as non-taxable. It, of course, would be a practical impossibility to trace the money loaned as between a borrower's expenditures for investment and for other purposes.

property* which *may be* located in Vermont and therefore subject to a property tax. We shall refer to such a property tax, measured by the value of the principal, as a capital tax, to distinguish it from the income tax and franchise tax, measured by income, with which we are now dealing. The argument of the Commissioner is that the interest which the statute in terms exempts from income tax is likely to be interest upon money borrowed and used by the borrower for the purchase of property subject to a capital tax, and that when any property so bought bears the burden of this capital tax, that justifies the exemption of the interest from the income tax which is imposed upon those who lend outside of Vermont.

In other words, the interest on the loan and the capital in which the loan is invested are said to be identical and it is pointed out that the capital tax on any tangible capital in which a Vermont loan is invested would exceed the income tax upon the interest upon an outside loan of the same size. His conclusion is that in some cases the interest on the Vermont loan has already borne its share of the burden due the state.

So far as we know, this is the first case where payment of a tax on capital has been urged as a justification for the exemption of the income upon that capital from an income tax which it would otherwise have to bear.

There is a case (*Hanover Insurance Co.* v. *Harding*, 272 U. S. 494 (1926) cited in our principal brief, p. 12), where it was urged that an ostensible exemption of a domestic insurance company from a net receipts tax, which was imposed on foreign insurance companies, was justified because in actual fact the net receipts of the domestic insurance company were taxed as part of the assets of the domestic insurance company. The tax on net receipts of foreign insurance companies was at the same rate as the tax on the assets of domestic insurance companies. On the other hand, the net receipts of foreign insurance com-

* Intangibles are tax exempt. (*Montpelier* v. *Gates*, 106 Vt. 116, 120, 170 Atl. 473 (1933). Cf. Appellee's brief, bottom of p. 24).

panies were assessed at full value and the assets of the domestic insurance companies, presumably containing their net receipts, were assessed at but 30% of the full value. This Court held that, while it might be true that the net receipts of the domestic insurance company were taxed as part of its assets, nevertheless, their under-assessment at 30% of the value worked a discrimination against a foreign insurance company whose net receipts were fully assessed at 100% of the value and that such discrimination was unconstitutional under the equal protection clause.

We assume that if the State of Vermont had been concerned in that case it would have made the same argument that it does here. That argument would have been as follows. The under-assessed net receipts are the same in substance as the capital of the company which earns them. Since the sum of the tax on that capital plus the tax on the under-assessed net receipts exceeds the tax on the fully-assessed net receipts, therefore the under-assessed net receipts bear their full quota of the burden due the state. The under-assessment is thereby justified.

In the *Hanover Insurance Co.* case, however, no one thought it worth while so to argue.

Income and the capital which produces it undoubtedly partake of one and the same substance, but that does not lead us into the absurdity that a mortgage for $1,000. is identical with the $50. interest due upon it. The $1,000. and the $50. are two different and separate sums. There thus would be good ground for argument that the payment of a capital tax on the *principal* of a loan could never be a justification for exempting the *income* thereon from an income tax which was assessed against the interest on other loans which had not been subjected to the capital tax.

The State's case here, however, is nowhere near as good as even that. The capital tax which is relied upon as a justification for the exemption of interest upon the borrowed money is not a tax assessed upon the borrowed money but a tax which *may be* assessed upon property purchased by the borrower if he *happens* to spend the bor-

rowed money in Vermont and *happens* to buy tangible property. No account is taken of the at least equal possibility that the fruits of the loan will go into non-taxable property as where they are used by a lumberman, quarryman or farmer as working capital to pay his expenses pending the production of his goods.

Even if the subject of the exemption could in every case be traced into the subject of the tax, however, that would not be enough. In order to justify the exemption there must be some logical relation between the tax which is imposed and the tax which is eliminated. This was pointed out on page 26 of our principal brief, and the case of *Bethlehem Motors Corporation* v. *Flynt*, 256 U. S. 421 (1921) was there cited and abstracted in support of our statement.

The link here between possible taxation of the debtor's hypothetical property and taxation of the creditor's actual income is too tenuous to constitute such a logical relation. In such a situation there is no room for the application of the rule laid down by Mr. Justice Holmes in *Klein* v. *Board of Supervisors*, 282 U. S. 19 (1930), cited in our principal brief at p. 23, that where property has already borne all but a small fraction of the burden due the state it may be exempted from tax without such exemption's constituting an illegal discrimination.* Under the rule of that case the interest upon an intra-state loan cannot be given exemption unless it has borne all but a fraction of the burden which the income tax imposes upon the interest on an extra-state loan. We find it difficult to compare the burden imposed by the income tax upon the interest on an extra-state loan with the burden which the interest on an intra-state loan may be said to have borne by virtue of the payment of a capital tax upon tangible property, which may have been purchased with the principal. The chain of

* Appellee's Brief (p. 26) states that this case approved the exemption of stock when the corporation had paid a local tax on but 75% of its property assessed at but *75% of its full value*. We believe that this represents a misconception of the opinion since we cannot conceive that Mr. Justice Holmes would have compared the part of the burden which the property had not borne to "a small fraction" (p. 23) if the Appellee's construction were correct.

cause and effect is too theoretical to serve as support for such an intensely practical matter as a tax.

The Commissioner's brief cites examples of statutes from other states where creditors have been exempted from taxation upon their credits. None of these examples involves an exemption from income tax. They are of two classes. The first of these classes is made up of general exemptions of creditors from capital taxation upon their credits without reference to locus. We can, of course, have no more quarrel with that than with Vermont's policy of not subjecting any intangibles to capital tax. The second of these classes involves the exemption of credits from capital taxation when secured by mortgages on real or personal property located within the state and when the mortgaged property is taxed at the same rate as the credit would have been if it had not been exempted. The obvious justification for such an exemption is to eliminate the subjecting of the same property twice to the same tax which inescapably occurs whenever a mortgage debt is taxed as against the mortgagee and the mortgaged property is taxed as against the mortgagor without deduction of the mortgage debt. The situation in the case at bar is far from anything of that sort. The tax eliminated is an income tax and the tax which the Commissioner says is paid is a capital tax. Thus, double taxation could not occur except in the limited sense that the taxation of capital and the taxation of the income therefrom is double taxation. Instead of property exempted from tax in the hands of A being sure to be subjected to a like tax in the hands of B, as in the case of the exemption of the mortgagee's interest in a mortgage, the best that the Commissioner can say in the case at bar is that a loan made in Vermont (the income of which is exempted from income tax) may, because made in Vermont, be invested in Vermont and may possibly be invested in the one class of property which is subject to a capital tax in Vermont, i. e., tangible property.

While the Commissioner's brief does not make the claim, we wish, for clarity, to point out that the interest exempted

from income tax by Public Act No. 17 does not represent income of the borrower upon which the borrower has paid a tax. Even if the borrower, as supposed by the Commissioner, invested what he borrowed in tangible property and even if he used that tangible property in his business to earn the interest, that interest so earned would not be subject to income tax in his hands. The debtor is expressly exempted from income tax upon it when he earns it by virtue of his right in computing his "business income" to deduct "all interest paid by the taxpayer during the income year".*

The Commissioner's attempt to justify the exemption of Vermont dividends from taxation.

The Commissioner's brief also uses the capital tax in an attempted justification of the exemption of extra-state dividends from income tax. The argument here is that even if the 2% tax on corporate earnings by itself does not justify the exemption from the 4% tax on dividends received, nevertheless, the 2% tax does constitute such a justification when we fortify it by adding to it the fact that the assets of the corporation earning the profits in Vermont may have been of a character subject to a capital tax in Vermont.

This very point might have been more forcibly made in *Hanover Insurance Co. v. Harding*, 272 U. S. 494 (1926, *supra*) and if correct, the *Hanover* case would have been decided differently and the under-assessment of the domestic insurance company for net receipts tax would have been sustained upon the ground that the tax paid by the domestic insurance company upon an under-assessment of all of its assets, including its net receipts, far exceeded the tax exacted from foreign insurance companies by a full assessment of their net receipts.

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*This exemption is contained in 1931 Public Act No. 17, Part I, Sec. 9, Subs. (b) as follows:

"Sec. 9. *Deductions.* In computing net income there shall be allowed as deductions:

* * * * * *

"(b). All interest paid by the taxpayer during the income year;"

In the case at bar, there is not even such a relation between the tax on the capital of the corporation and the tax on the income of the stockholder as existed between the two taxes in the *Hanover* case. This is true because the exempted income never bore any part of the capital tax when it formed part of the capital since nothing but tangible property is subject to capital tax in Vermont.*

In the case at bar, the Vermont earnings of a given corporation may have arisen from non-taxable intangibles, or from personal services, so that the corporation would pay little or no capital tax. If the dividends thus earned are exempted from tax as required by Public Act No. 17, neither the corporation nor the stockholders, nor even both together, bear their quota of the burden due the state, either by way of income tax or by way of capital tax. We add to this flaw the fact that the amount of dividends exempted depends upon the amount of business done by the corporation within Vermont during the year when the dividends are declared, not the year during which the dividends are earned. Taking all of these considerations together, the chances are very slim that the capital taxes paid by a corporation in any given year have any relation to the taxes on income received during that year from which the stockholders are exempted.

There remains the fact that the capital taxes paid are assessed upon capital, a different thing from income. In the *Hanover* case, this Court balanced the tax upon the net receipts of foreign insurance companies against the tax upon the net receipts of domestic insurance companies without throwing into the scale the taxes upon the capital of the domestic insurance companies. There is no more reason why the Court should do so here.

The capital taxes paid by corporations within Vermont are paid in consideration of the protection of that capital. The payment of such taxes does not entitle the enterprise to a line of credit at the State Treasury which may be used

* *Montpelier* v. *Gates*, 106 Vt. 116, 120, 170 Atl. 473 (1933). Cf. Appellee's brief, bottom of p. 24.

to justify a lesser income tax upon the stockholders of those corporations than upon the stockholders of outside corporations.

It has never been decided that a state might adopt a consistent policy of taxing, by way of capital tax, all intra-state wealth and of taxing, by way of income tax, all extra-state wealth of its citizens. Certainly if such a system were to be sustained, there would have to be a very close relation between the income tax and the capital tax in order to avoid an unconstitutional discrimination against other states. But the State of Vermont has not attempted that consistent policy here. Intra-state tangible real and personal property is subject to capital tax, yet the rents and earnings therefrom are subject to income tax.* Intra-state loans at more than 5% are subjected to income tax. The intra-state tangible property of corporations is subject to capital tax**, yet the earnings therefrom are subject to "franchise tax on corporations to be measured by net income."***

CONCLUSION.

All that the Commissioner has done in pointing out that the intra-state borrower may use his loan to buy property on which he pays taxes and that the intra-state corporation may earn its dividends with property on which it pays taxes is to emphasize the correctness of the Vermont Supreme Court's view of the purpose of the Statute. That is that by discriminating against citizens' investment outside of the State, Vermont drives their investments into

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* 1931 Public Act No. 17, Pt. I, Secs. 5 and 6 as follows:

"Sec. 5. *Net income defined.* The words 'net income' mean the gross income of a tax payer less the deductions allowed by this act.

"Sec. 6. *Gross income defined; exemptions.* 1. The words 'gross income' include gains, profits and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, business commerce, and net rental from real and personal property. * * *"

** Appellee's brief, bottom of p. 24.

*** 1931 Public Act No. 17, Pt. II, Secs. 2 and 3, quoted at Appellant's Brief, p. 5.

the State. The Commissioner says that one of the results of that is to increase the property within the State which is subject to capital tax. That general effect upon the Vermont tax situation is too remote from the income tax exemptions to meet the test that the exempted property, to sustain its exemption, must have borne its quota of the burden due the state. The real question in the case is the one squarely met by the Supreme Court of Vermont. That question is whether a policy of keeping Vermont capital in Vermont is a sufficient justification for an income tax law which exempts Vermont income and taxes outside income. We submit that there can be no justification for such a law since it works a clear and hostile discrimination which abridges the privileges and immunities of citizens of the United States and deprives them of the equal protection of the laws.

Note as to Appellee's treatment of Appellant's Point IV.

The Commissioner's brief is in error in stating (p. 33) that there is no proof in the case that the Appellant's wife did not use the $800. exemption which he claims. While a small matter, this deserves correction.

The agreed statement of facts (R. 14) contains the following statement (R. 11, italics ours):

> "8. That said tax was computed without the benefit of a personal exemption of $800.00 *to which the taxpayer would have been entitled* as a married individual living with his wife but for the fact that he received during said year an amount of Class A income, so-called."

Respectfully submitted,

E. J. Dimock,
Counsel for Appellant.

Alfred Gregory,
George L. Hunt,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1935

No. 8

JAMES C. COLGATE,
Appellant,

vs.

ERWIN M. HARVEY, Tax Commissioner of the State of Vermont,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF VERMONT

APPELLEE'S BRIEF

LAWRENCE C. JONES,
Attorney General.

GUY M. PAGE,
SEYMOUR P. EDGERTON,
of Counsel.

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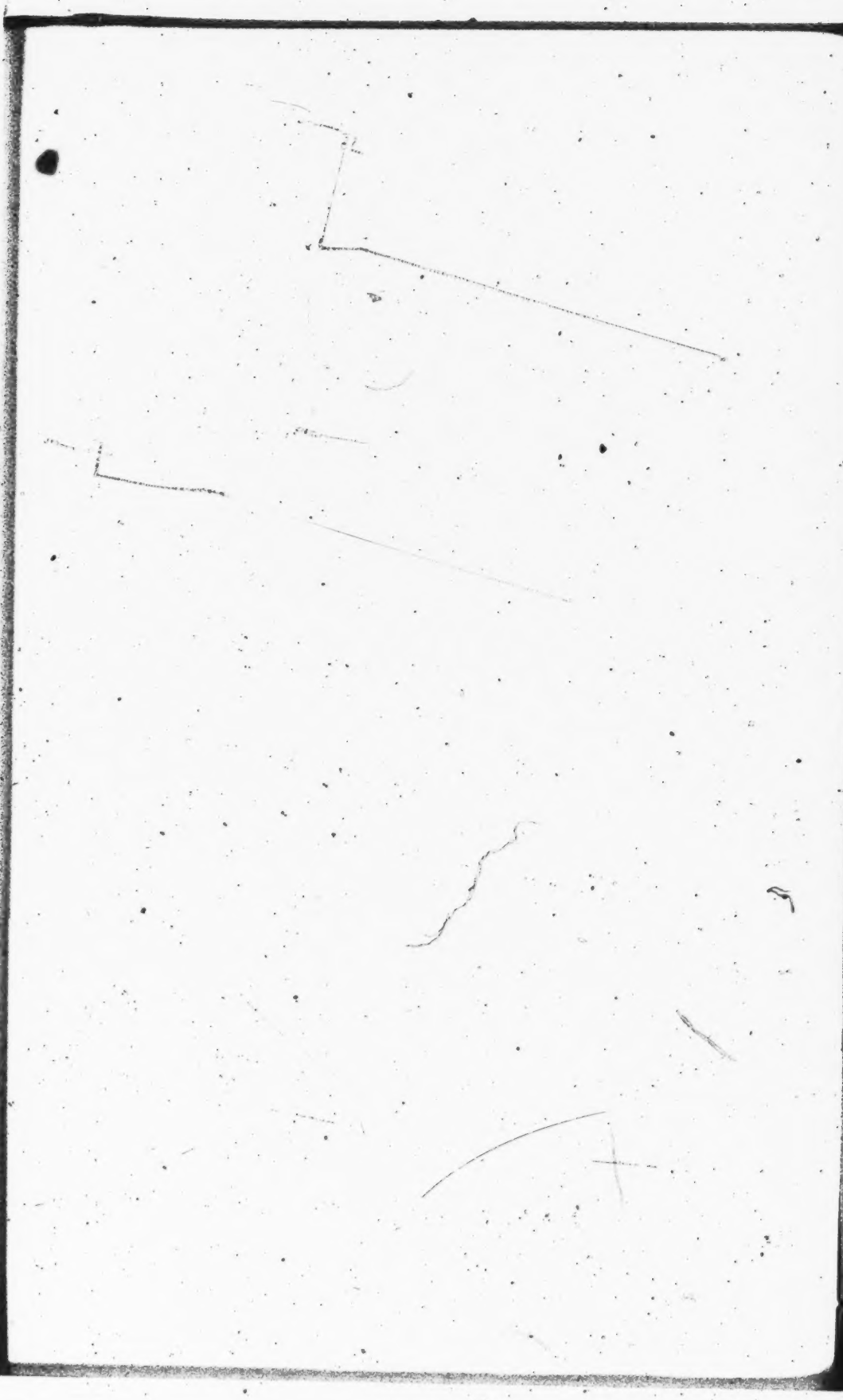
*Briefed by Appellant as October Term, 1934, No. 790.



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SUMMARY OF ARGUMENT

Appellant's Point I.

The claimed discriminations against appellant, a citizen of Vermont, contained in the Vermont income tax law, are solely the result of classification of income for taxation. The act applies to all residents of the State and to no non-residents. The challenged classifications are directed to the exemption of dividends from stock proportionately to the taxation of the corporation by Vermont and to the exemption of credits bearing a rate of interest of not over 5%, created by investments within the State.

The State is not forbidden to classify income for tax purposes, and to exempt income where the same economic interest is otherwise taxed by it. The basis of the classification is admittedly not capricious but "extremely logical" and it is challenged because of its burden upon the right of a citizen of Vermont to invest in other states. None of the cases cited by the appellant sustain his claim. They relate to capricious classification,* or to classifications of taxpayers†, or to provisions not present in the challenged statute§.

As to the exemption of credits, the statutory history shows that it was originally enacted and has been retained to remove a barrier effectively discouraging the investment of Vermont funds in the State, by avoidance of double taxation, dividing the burden of a single tax between the borrower and the lender. Ef-

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*Louisville Gas & El. Co. v. Coleman, 277 U. S. 32; F. S. Royster Guano Co. v. Virginia, 253 U. S. 412.

† Hanover Fire Ins. Co. v. Harding, 272 U. S. 494; Chalker v. Birmingham & N. W. Ry. Co., 249 U. S. 522; Bethlehem Motors Corp. v. Flynt, 256 U. S. 421.

§ Klein v. Board of Supervisors, 282 U. S. 19.

forts of the State to avoid double taxation by offsetting debits against credits or other personal property began as early as 1797 and were increasingly extended down to 1912. In that year the deduction of debts from the personal property listed to a taxpayer was abolished and by the same act provision made exempting credits from the general property tax, if the rate of interest did not exceed 5%. An amendment at the next session permitted the taxpayer to deduct from his property list a limited amount of credits which were taxed by the State because bearing interest at 6%. The result was to give to a debtor taxpayer either a tax exemption or an interest credit on account of his debt, exempting the creditor who reduced his interest and taxing the creditor whose credit was deducted from the debtor's tax list because the creditor exacted the legal rate of interest. The system thus resulted in substantial avoidance of twice taxing the same wealth. When a flat rate on intangibles was substituted for the general property tax upon them and when the income tax was in turn substituted for the tax on intangibles, the exemption of money loaned within the State at 5% was retained in the new system. In practical operation (which is the test) the statute corresponds closely with a "general usage" in many other states. Appellant challenges the alleged purpose of the statute to encourage investment of Vermont funds in Vermont, but such encouragement in view of the evil sought to be remedied, does not involve the exercise of any power prohibited to the states. The record is barren of any evidence of injurious effects with respect to investments in other states.

As to the exemption of income from corporate dividends in proportion to the taxation of the corporation upon its income, appellant's challenge is that the criterion of classification is the liability to a 2% State franchise tax upon foreign and domestic corporations alike, measured by the income attributable to Vermont.

It is appellant's contention that the 2% tax on corporate income by this franchise tax is not commensurate with the exemption from the 4% taxation of dividends received by resident individuals. But the franchise tax is not the measure of the tax burden on account of which income from dividends is proportionately exempted. In practical operation the corporations paying the franchise tax will be found to be taxed upon their property to an extent roughly proportional to the franchise tax and at a local rate exceeding 3% of the capital. When both the franchise tax and the property tax are considered, the tax discrepancy of which appellant complains ceases to exist. And apart from the property tax, in view of the probable variation between corporatee arnings and corporate dividend distributions, the discrepancy is not greater than has been sustained by this Court, as within the power of the states.

Appellant's Point II.

Appellant asserts that the challenged exemptions constitute a regulation of interstate commerce by a practical embargo upon the exportation of capital from Vermont into other states. But the creation of credits and the acquisition of corporate stock is not interstate commerce. The two cases cited by appellant* do not so hold. One is inapposite and in the other, it was left undecided whether the peculiar attributes of a large investment business in other states rendered it interstate commerce. But many decisions of this Court establish the fact that personal contracts, the creation of credits, the purchase of commercial paper, or corporate stock or commodities in one state by the citizen of another, are not interstate commerce, but are local in their character. The possibility that interstate commerce will ensue is insufficient to change the

**Northwestern Mut. Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132, and *New Jersey Telephone Co.* v. *Tax Board*, 280 U. S. 338, 346.

character. Moreover, the record is silent as to whether any interstate transaction occurred with respect to the ownership or the receipt of income by appellant who, though a resident of Vermont, is a stockbroker in New York. The thing taxed is the receipt and enjoyment of income having a Vermont situs.

Appellant's Point III.

The declaration of invalidity of an important part of the State taxing system because of inequality ought not to preclude a reassessment, under appropriate legislation, upon appellant and those unlawfully exempted.

Appellant's Point IV.

The statute provides for two alternative personal exemptions, the larger one to be deducted from business income,—"Class A Income"—the smaller, if there is no Class A Income, to be deducted from income from intangibles,—"Class B Income."

The peculiar situation of appellant was such that he did not claim on his return (because he would not receive) either exemption. The exemption of which he now says he has been unlawfully deprived is a mere subsistence exemption and it is not beyond the power of the State to deny it to a class which has other income. The incidental inequalities are unsubstantial and are not prohibited by the Federal Constitution. Moreover, the record is insufficient to warrant a reversal upon this ground.

Appellant's Conclusion.

The express legislative intention that the invalidity of any portion of the act should not invalidate the rest raises a presumption of intention which, in the instant case, should operate to save all proper provisions in spite of any possible invalidity of the challenged exemptions. This question is ultimately for the State Court.

But the exemptions challenged by appellant violate no right guaranteed to him by the Federal Constitution.

ARGUMENT

APPELLANT'S POINT I.

The Vermont statute here challenged provides for the taxation of residents of Vermont. (Public Laws of Vermont, 1933, Sec. 873.)[1] Appellant is a resident citizen. (*Rec. p.* 8, *fol.* 14.) The statute challenged applies indistinguishably to all residents and to no non-residents. There is therefore involved no discrimination against citizens of other states. There is no discrimination between citizens of Vermont unless it results from the classification of income. The questions raised by appellant under his *Point I* are wholly questions of the validity of classifications, with respect to exemptions. These classifications operate solely to exempt the income from property which has been subjected to the taxing laws of the State with respect to property of that class. The challenged exemptions are thus directed to the avoidance of double or multiple taxation by Vermont of the same economic interest, viz: (a) shares of stock in corporations to the extent to which the issuing corporation is taxed in Vermont, and (b) certain credits, the consideration for which became a part of the general wealth of the State and thereby subject to its tax laws.

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[1]This section of the revision of the statutes was originally Sec. 3 of Part I of No. 17 of the Acts of 1931, and is so cited by appellant in his brief, (p. 3). Appellee here and elsewhere uses the sections of the revision.

The general power of states to classify for purposes of taxation is not open to question.[2] It applies equally to classification of incomes for taxation. . . In such taxation "possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious do not fall within constitutional prohibitions." (*Lawrence* v. *State Tax Commission*, 286 U. S. 276, 284.) "It is not necessary . . . . that the basis of the classification must be deducible from the nature of the things classified . . . . . It is enough, for instance, if the classification is reasonably found in the 'purposes and policy of taxation.'" (*Watson* v. *State Comptroller of New York*, 254 U. S. 122, 125; *Stebbins* v. *Riley*, 268 U. S. 137, 143.)

A basis of classification is reasonable and valid which operates to avoid double taxation by a single state of the same economic interest. (*Lawrence* v. *State Tax Commission, supra; Klein* v. *Board of Supervisors*, 282 U. S. 19, 23; *Kidd* v. *Alabama*, 188 U. S. 730, 732; *Darnell* v. *Indiana*, 226 U. S. 390; *Watson* v. *New York, supra; Clement National Bank* v. *Vermont*, 231 U. S. 120; *Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S. 535.)

The rule has a wide variety of application. Thus a state may tax income of a foreign insurance corporation received in the state during the year and transmit-

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[2]See *Ohio Oil Co.* v. *Conway*, 281 U. S. 146; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232; *Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364; *Merchants &c. Bank* v. *Pennsylvania*, 167 U. S. 461; *Clement National Bank* v. *Vermont*, 231 U. S. 120; *Lawrence* v. *State Tax Com.*, 286 U. S. 276; *Magoun* v. *Illinois T. & S. Bank*, 170 U. S. 283; *Maxwell* v. *Bugbee*, 250 U. S. 525; *Magnano* v. *Hamilton*, 292 U. S. 40; *Watson* v. *State Comptroller*, 254 U. S. 122; *State Board* v. *Jackson*, 283 U. S. 527; *Pacific Am. Fisheries* v. *Alaska*, 269 U. S. 269; *New York* v. *Roberts*, 171 U. S. 658; *Northwestern Mut. Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132.

ted to the state of its domicile, and may omit to so tax similar domestic corporations, if it taxes them annually at the same rate for the sum of their property, which presumably includes the income. (*Concordia Fire Ins. Co.* v. *Illinois*, *supra*, 292 U. S. 535.) It may tax express companies which, due to their method of operation, have no substantial amount of taxable physical property, and may omit to so tax express companies using their own cars and steamboats. (*Pacific Express* v. *Seibert*, 142 U. S. 339.) It may impose upon domestic insurance corporations a large commutation tax, by way of a franchise tax, measured by income from credits largely on account of investments outside the state, although its franchise tax on foreign insurance companies licensed within the state is a small flat fee This classification reflects the right of the state to tax the domestic corporation on account of all property having situs within the state. (*Northwestern Mutual Life* v. *Wisconsin*, 247 U. S. 132). It may (or it could prior to the establishment of the present doctrine of situs) tax non-resident stockholders at a flat uniform rate without deductions, and tax resident stockholders at the local rate, after deducting a proportional part of the corporate real estate taxed within the state. (*Travellers' Ins. Co.* v. *Connecticut* 185 U. S. 364.) It may exempt from taxation depositors in banks which have paid a tax on deposits and tax depositors in banks which have paid no such tax. (*Clement National Bank* v. *Vermont*, *supra*, 231 U. S. 120.) It may tax at a flat rate corporations not subject to a tax at elected domiciles within the state, and exempt corporations which are taxable at their domiciles. (*General American Tank Car Corp.* v. *Day*, 270 U. S. 367.) It may distinguish in its inheritance tax laws between property which was taxed in the owner's life time and that which was not, exempting the one and taxing the other. (*Watson* v. *Comptroller of New York*, *supra*, 254 U. S. 122.) It may tax an individual for the

receipt of income earned outside the state, and exempt a corporation from such a tax, under a policy of avoiding double taxation by exempting the income of the corporation but taxing the dividends to the stockholders. (*Lawrence* v. *State Tax Com.*, *supra*, 286 U. S. 276.)

The right to exempt persons or property from one tax because the same economic interest has been otherwise taxed has been repeatedly applied in cases with respect to the taxation of corporations or the stockholders.

Thus, in *Kidd* v. *Alabama*, *supra*, (188 U. S. 730) a tax to the holder upon shares of stock in foreign railroad corporations not operating in Alabama was challenged because no similar tax was laid on shares of domestic railroads or foreign railroads doing business in the state. This Court, by Mr. Justice Holmes, said (p. 732):

> "We say that the state in taxing stock may take into account the fact that the property and franchises of the corporation are untaxed, whereas in other cases they are taxed; and we say untaxed because they are not taxed by the state in question . . . . If the property is untaxed by its laws, then for the purpose of its laws the property is not taxed at all."

The doctrine of that case was followed by this Court in *Darnell* v. *Indiana*, 226 U. S. 390. There the Indiana statute exempted from taxation shares of stock in domestic corporations to the extent that the corporation was taxed by Indiana for its tangible corporate property, but taxed foreign corporations. The case involved no question with respect to an allowance to a foreign corporation which had property taxed within the State of Indiana, and it was held that the case was governed by *Kidd* v. *Alabama*, and was consistent with

substantial equality notwithstanding the technical differences.

In *Klein* v. *Board of Supervisors*, 282 U. S. 19, the Kentucky statute taxed stock in corporations, exempting shares in corporations which paid taxes in Kentucky upon 75% of their total property. This Court held that while a state may tax both the corporation and its stockholders, it need not do so, for it is just not to tax the stockholders on values that have already borne their share through the taxation of the corporation.

It is the necessary conclusion from these cases that a state may so classify the objects of taxation within its jurisdiction as to avoid taxing the same value more than once and in so doing may disregard the taxation imposed by other states. Under the decisions of this Court, therefore, the State of Vermont may so adjust its income tax law as to reflect the tax burdens otherwise imposed by its laws without lessening its tax burdens because the wealth which it taxes has in some form been subjected to taxation by other states.

Appellant under *Point I* of his Brief attacks the classification in the Vermont income tax law as a discrimination against the privileges of a citizen of the United States because it imposes a greater tax burden upon citizens of the State of Vermont when they invest "in enterprises of sister states" than when they invest in Vermont. The objection is that thereby citizens of Vermont are deprived of the supposed right "to invest in non-Vermont loans and stocks on at least as favorable terms as they are permitted to invest in Vermont loans and stocks." (*Br. p.* 12.)

This objection is directed to a tax classification whereby in effect, the income from certain property once taxed by the state of Vermont is exempted from its income tax, and this exemption does not extend to the income from investments not otherwise taxed by Vermont, viz., shares of stock of corporations, to the extent that the corporations pay no Vermont tax, and credits from

investments outside the state. This, appellant claims, operates as an "embargo" (*Br. p.* 27) upon investments in other states by residents of Vermont. "This is not," he says, (*Br. p.* 15), "the usual case of a classification invalid because capricious and without logical basis. Its basis is extremely logical but wholly vicious and repugnant to the Fourteenth Amendment and to the whole theory of our union of states." But the repeated rulings of this Court cited above are to the contrary. Nor is there anything to support appellant's theory in the cases upon which he relies.

Appellant cites (*Br. p.* 12) *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, to the effect that capricious classifications for purposes of taxation are invalid. In the Coleman case no logical ground of distinction was found between the acts taxed and untaxed. Here the logical distinction is admitted by the appellant (*Br. p.* 15) and is established by the many decisions of this Court, cited above, to the effect that for tax purposes there is an obvious distinction between property and rights which have once been taxed by a state, and property and rights which are untaxed, or taxed only by another state.

Appellant relies upon *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494, where a classification was made between foreign insurance companies admitted into the state and domestic insurance companies. The admitted foreign companies were taxed upon the full value of their net receipts as property and the domestic corporations upon only 30% of the full value of their property, which presumptively included net receipts. It was held that the resultant "heavy discrimination in favor of the domestic insurance companies of the same class and in the same business" was without justifiable basis and the statute invalid.

The case turned upon the fact (p. 515) that the foreign companies had been admitted into the state and thereby "put on a level with all other insurance

companies of the same kind, domestic or foreign, within the state," and entitled to equality of treatment under its tax laws. There remained after admission no line of demarcation between the foreign and domestic companies in the same business, by which the one and not the other might be required to pay a higher tax with respect to the same class of property. The case was one of unjustifiable classification of taxpayers.

In the case at bar there is no classification of taxpayers under the income tax law. The sole classification is of income. That classification is admittedly "extremely logical" and operates equally with respect to all taxpayers who are recipients of income in any of the specified classes. The distinction between the cases is fundamental. The Fourteenth Amendment guarantees equal protection to taxpayers similarly situated, but it "does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties . . . ." (*State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527, 537[3])

As pointed out by appellant (*Br. p.* 14) the privileges and immunities protected under the Fourteenth Amendment are those that arise from the Constitution and laws of the United States, rather than those which spring from other sources.[4] Nothing in the

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[3]See also to the same effect: *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, at 237; *Pacific Express* v. *Seibert*, 142 U. S. 339, at 352; *Ohio Oil Co.* v. *Conway*, 281 U. S. 146; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114; *Am. Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Beers* v *Glynn*, 211 U. S. 477, 485.

[4]See to this effect: *Slaughter-House Cases*, 16 Wall. 36; *Twining* v. *New Jersey*, 211 U. S. 78; *Duncan* v. *Missouri*, 152 U. S. 377; *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530.

Constitution or laws of the United States requires the equal taxation of all property, although the Constitution of the United States does require the equal protection of all citizens similarly situated.

Appellant argues by analogy from the holding of this Court in *Chalker* v. *Birmingham & N. W. Ry. Co.*, 249 U. S. 522, that because a state may not discriminate against citizens of other states by imposing a higher tax upon them than it does upon its own citizens, a state may not tax the investments of its own citizens in other states differently than it taxes their investments at home. But the case cited does not support the conclusion nor is the rule asserted in accord with the decisions of this Court. In the *Chalker* case, the amount of an occupational tax was determined by the location of the principal office of the taxpayer, and in practical operation this criterion would prevent a citizen from receiving in more than one state the equal treatment with the citizens of that state which is required by Article IV of the Federal Constitution. But nothing in the Federal Constitution requires that a state shall twice tax the property which a citizen has left at home, subject to the taxing laws, because property which he has invested in other states is to be once taxed at home. (*Kidd* v. *Alabama*, 188 U. S. 730; *Klein* v. *Board*, 282 U. S. 19; *Lawrence* v. *State Tax Com.*, 286 U. S. 276; *Darnell* v. *Indiana*, 226 U. S. 390, all cited *supra.*)

The case last cited, (*Darnell* v. *Indiana*, 226 U. S. 390,) is cited by appellant with respect to a question which is there left undecided,—the failure of the statute there under consideration to exempt the stock of foreign corporations taxed in Indiana, equally with stock in domestic corporations there taxed. Appellant says (p. 18) that the question in the case at bar is "very like" the one there reserved. But the Vermont statute treats foreign and domestic corporations alike, taxing and exempting the income of the stock

of each in proportion as the corporate activities are taxed by Vermont. The statute considered in the *Darnell* case is wholly different in this respect from the challenged Vermont statute, but the principles upon which the other features of the Indiana statute were sustained are entirely and similarly applicable to the statute here challenged and are decisive of its validity.

Appellant repeatedly cites and relies upon *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, but that case makes for the appellee. The statute there challenged presented the reverse of the provisions against which appellant complains in the instant case. There a Virginia corporation was taxed by Virginia upon all its profits wherever realized, if it did any business in Virginia, and therefore was presumably otherwise taxed in Virginia; but if it did no business in Virginia and therefore presumably paid no property tax to Virginia,[5] it was exempted from taxation on account of its profits realized anywhere. This Court incidentally pointed out (253 U. S. at 416) that doing business within Virginia, if given any effect, ought to induce more favorable rather than less favorable treatment of the corporation with respect to the taxation of its income. (See quotation *Apt's Br. p.* 19.) The operation of the Vermont statute here challenged accords with the doctrine thus expressed.

Upon the foregoing cases appellant bases his contention that a citizen is deprived of his constitutional protection if the taxes of the state of his domicile bear less heavily upon income from property which it has taxed than upon income from property which is untaxed by it. No one of the cases is measurably near

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[5]To the effect that a corporation's property is presumptively where its business is done, see also *Bethlehem Motors Corp.* v. *Flynt*, 256 U. S. 421; *Northwestern Mutual L. Ins. Co.* v. *Wisconsin*, 247 U. S. 132; 139; *Kidd* v. *Alabama*, 188 U. S. 730, 732.

to sustaining the claim asserted. On the contrary, the rule is firmly established by the decisions of this Court heretofore discussed in this brief, (*supra*, pp. 6-9) that a state may so shape its taxation of incomes as to exempt the income from wealth which it has once taxed, and at the same time tax the receipt of income from wealth untaxed by it. The provisions of the Vermont income tax law here challenged accomplish this in their practical operation and do not otherwise discriminate.

Appellant first discusses the exemption of the income from money loaned within the State of Vermont at not over 5% per annum. He concedes (*Br. Subd.* 2, *p.* 20) the application of the established rule that classification by legislation is to be held valid "if any state of facts reasonably can be conceived that would sustain it."[6] And appellant asserts that the only state of facts which can be conceived as a basis for the exemption of money loaned within Vermont at not over 5% was the legislative purpose "to encourage the loan of money for use in Vermont business."

An examination of the history and effect of this provision discloses that the encouragement intended was the removal of the barrier of double taxation of the same intrinsic wealth, a barrier adequate to effectively discourage investment of Vermont funds within the state.

This exemption originated as a part of the general property tax law when credits were taxed equally with the general tangible property of the state. It was incorporated in the income tax law enacted in 1931, verbatim, (with unimportant omissions) from the exemption existing under the law taxing intangibles

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[6]To the effect that this is the true rule see: *State Board of Tax Commissioners of Indiana* v. *Jackson*, 283 U. S. 527; *Rast* v. *Van Deman*, 240 U. S. 342.

at a uniform flat rate. (*Sec.* 1, *subd. V., No.* 21, *Acts of* 1925.) It had been incorporated in the intangible tax law, by reference, from the general property tax law of the state (*Gen. Laws of Vt.*, 1917, *sec.* 684, *subd. XIII*); at the time when corporate stock and credits were first withdrawn from the general property taxes for state and local purposes. The exemption was originally enacted as *Sec.* 1 *of No.* 35 of the *Acts of* 1912, entitled "An act relating to exemptions from taxation and abolishing deductions for debts owing." Prior to the enactment of this exemption, the general property tax laws of the state permitted the taxpayer to deduct his debts owing from the amount of his taxable personal property (including intangibles) but not from the amount of his real property. His tax was assessed upon the net amount of his property so determined. (*Pub. Stat. of Vt.* 1906, § 549.) This system, limited to deductions from credits, was in force in 1797 (*Laws of Vt.* 1797, *c. LXII*, § 2), was given a broader scope in 1841 (*Sec.* 14, *No.* 16, *Acts of* 1841) and since 1882 (*Sec.* 12, *No.* 2, *Acts of* 1882) had existed in substantially the same form. Apart from abuses and inequalities in administration, these tax laws operated to tax above his net worth a property owner whose debts exceeded his personal property.

By No. 510 of the Acts of 1906, the legislature created a "Commission to Investigate Double Taxation". No substantial change in the tax laws resulted until the third succeeding legislative session. Finally legislation (*Sec.* 1, *No.* 35, *Acts of* 1912) was enacted providing:

> "Money loaned within the state at a rate of interest not to exceed five percent per annum, evidenced by a promissory note, mortgage on real estate or personal estate, or by a bond for a deed, shall be exempt from taxation."

and by the same act (Sec. 2) the law authorizing deductions on account of debts owing was repealed.[7]

Subsequently (*Sec.* 1, *No.* 34, *Acts of* 1915) the exemption was extended to include credits representing the purchase price of real estate or tangible personal property within the State. This extension as to real estate, was in the terms of the exemption here challenged. By the same act (*Sec.* 4) the taxpayer was permitted to deduct from the amount of his taxable estate 50% of his debts owing, upon which he was paying the legal rate of 6% but with a limitation of $1000.

The report of the Tax Commissioner to the General Assembly in 1914[8] showed an average tax rate in the State for 1913, of 1.77% and for 1914 of 1.88% of the assessed value of the property. In 1932, when the income tax law was passed the average rate was 3.11%.

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[7]This statute is in a form closely corresponding to the recommendation of a minority of the Commission to Investigate Double Taxation. (Report, p. 90.) The majority recommended the repeal of deductions for debts owing. (Report, pp. 49-55.) This report was entitled to judicial notice in the Court below and therefore here. See Note 8 *infra*. See also *Gibbes* v. *Zimmerman*, 290 U. S. 326.

[8]The Report of the Commissioner of Taxes is judicially noticed in the State of Vermont. (*In re Fulham's Estate*, 96 Vt. 308, 316) and is therefore to be judicially noticed here on appeal. (*Renaud* v. *Abbott*, 116 U. S. 277, 285-286; *Hanley* v. *Donoghue*, 116 U. S. 1, 7; *Abie State Bank* v. *Bryan*, 282 U. S. 765, 778; *Gibbes* v. *Zimmerman*,, 290 U. S. 326. The above data appears in the 1914 Report at pp. 309-310; in the 1932 Report at pp. 92-114.

Substantially the same information is available from the reports of the Bureau of the Census of the Department of Commerce, which are entitled to judicial notice here. (*Tempel* v. *United States*, 248 U. S. 121, 130) See *Statistical Abstract of the U. S.*, 1922, pp. 630, 631; *Fin. Statistics of State and Local Governments*, 1932, p. 1821 from which the average rate may be obtained by dividing the tax receipts by the taxable property.

From the history of the challenged exemption of money loaned within this state at 5% or less, it is thus apparent that:

(1) Before the enactment of the exemption statute a loan of money within the state brought into being two taxable interests where only one existed before. The same was true in the case of a sale on credit. In neither case was any new wealth created.

(2) Both interests were subjected to taxation at the rate of nearly two percent, except insofar as the debtor had personal property against which he could offset his debt.

(3) Thus the ownership of property acquired by incurring indebtedness resulted in taxation which was disproportionate and prohibitive.

(4) The legislature in recognition of this doubled tax burden caused the subject of double taxation to be investigated and finally evolved a plan which would remove the unreasonable burden upon investment of funds in Vermont.

(5) The plan operated alike with respect to funds of citizens of Vermont and citizens of other states. The evil which it was sought to remedy existed only when the state taxed both of two property rights together representing but a single item of wealth. The remedy therefore could be applied only where the two property rights—the credit and the wealth out of which it arose—both remained in the state. The exemption therefore was limited to loans or credits within the State. By this means double taxation was measurably avoided and investment encouraged by making it economically practicable.

(6) By the enactment of the taxing statute imposing a flat rate upon intangibles the situation was not fundamentally changed. Under that law the repeal of the "5% exemption" would have recreated the so called double taxation, although at a lowered rate on the credit and a higher rate on the debtor's investment of the proceeds of the credit.

(7) The same conditions would have existed with respect to the omission of the exemption in the income tax law; for the taxation of income is essentially the taxation of the property from which it is derived.[9]

The obvious effect of the change in taxation thus enacted in 1913 and 1915 was to tax the property and exempt the credit, provided the creditor yielded 1% of the legal rate of interest; and if the creditor exacted the legal rate of interest, to tax the creditor and permit the debtor to deduct one-half of the taxable debt (with limitations) which amounted to substantially 1%. In other words, the legislature recognized that the sale on credit of property within the State or the lending of money within the State to become a part of the property of the debtor[10] in fact created no new wealth and so a single tax was exacted, within limitations. The incidence of the tax was substantially equally divided between the debtor and the creditor. The system thus achieved is analogous to systems for the axation of

[9]See *Pollock* v. *Farmers Loan & Tr. Co.*, 157 U. S. 429, 581; *Weston* v. *Charleston*, 27 U. S. (2 Pet.) 449; *Railroad Co.* v. *Jackson*, 7 Wall. 262; *Opinion of Justices*, 220 Mass. 613; *Wright* v. *Georgia R.R.*, 216 U. S. 420, hereinafter again cited.

[10]The statute as construed by the State Court (Rec. 24, (fol. 42)) relates to money invested in Vermont and not merely to the locus of the loan contract.

credits in force in many jurisdictions and uniformly sustained by the courts."

Thus the statute here challenged is essentially like statutes in force in many states wholly exempting notes secured by mortgage upon real estate within the state, or upon personal property within the state, or a certain class of property within the state. Yet these statutes have never been deemed violative of constitutional guaranties. The practical operation of the statute is similar to statutes such as that of Nebraska permitting the mortgagor to offset against his debt taxes paid upon the real estate to the amount of the mortgage debt. In Colorado it is provided that where property in the state is mortgaged, the property and notes shall be assessed at the value of the property only, and the notes shall not be otherwise assessed. Connecticut and Massachusetts have provisions that money at interest secured by a mortgage of domestic real estate shall be exempt from taxation to the amount of the taxable value of the real estate. In Louisiana and in Montana, debts secured by mortgage of property within the state are exempt. In Oregon, prior to the amendment of 1931, there was a similar exemption as to loans secured by real estate mortgage. Utah had a constitutional provision prior to 1930 for exemption when the mortgage was upon real or personal property, and Wyoming has a similar statutory provision as to mortgages upon property within the state.

Mississippi exempts all notes and evidences of indebtedness and money loaned at a rate of interest not exceeding 6%. In New York there is a mortgage recording tax of fifty cents per one hundred dollars of principal debt, and, prior to 1933, all mortgages and

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[11]In an appendix to this brief the statutory provisions discussed in this and succeeding paragraphs are reviewed in more detail with citations to the statutes and decisions of state courts with respect tothem. The decisions are there collected; p. 44.

the secured obligations were free from state or local taxation. The Pennsylvania statutes provide for the exemption from local taxation of mortgages, judgments, etc. and money owing upon agreements for the sale of real estate. Indiana and North Carolina have somewhat similar provisions. In the former state an owner of real estate, indebted by way of mortgage, may deduct up to $1,000 of the mortgage debt from the assessed value of the real estate but not exceeding one-half the value of the real estate; and in the latter state, notes and mortgages given to build, repair or purchase a home not exceeding $8,000, are exempt to 50% of the value of the notes and mortgages. Washington does not consider mortgages, notes, credits, tax certificates or bonds as property for tax purposes, and no deductions are allowed for debts owing. Finally, in Wisconsin, all money or debts due and all stocks and bonds, not especially provided for, are exempt.

It will be seen, therefore, that viewed in the light of its practical operation, the statute challenged in the instant case is within the "general usage" of the states, which in the frequently quoted statement in *Bell's Gap R. Co.* v. *Pennsylvania, supra,* (134 U. S. 232, 237), was said not to be forbidden by the Fourteenth Amendment.

In view of the foregoing considerations it cannot be said that a classification resulting in the exemption of money loaned within the State of Vermont at not to exceed 5% per annum, precludes the assumption that the classification was made in the exercise of legislative judgment and discretion, (*Stebbins* v. *Riley,* 268 U. S. 137, 143; *Swiss Oil Co.* v. *Shanks,* 273 U. S. 407, 413-414) or that no state of facts "reasonably can be conceived that would sustain it," (*State Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527, 537; *Rast* v. *Van Deman,* 240 U. S. 342, 357) or that it does not have "a reasonable relation to some permitted end of governmental action," or that it is not "reasonably found in the purposes and policy of taxation." (*Watson*

v. *State Comptroller of New York, supra,* 254 U. S. 122, 125.)

It is the contention of appellant that a legislative purpose to encourage the investment of Vermont money for the assistance of the agricultural and industrial interests of the State is an unlawful and prohibited purpose and the very ground of his attack upon the statute. (*Br. p.* 20) But without the exemption, a debt-burdened class of residents would be subjected to tax laws oppressive in proportion to the taxpayers' indebtedness. As this Court said at the last term with respect to the exemption of carriers of farm produce, (*Aero Mayflower Transit Co.* v. *Georgia,* 55 S. Ct. Rep. 709, 79 L. ed. Adv. Op. 749) in view of the plight of the Georgia farmer as pictured, "to free him of fresh burdens might seem to a wise statecraft to be a means whereby to foster agriculture and promote the common good."

In *Stephenson* v. *Binford,* 287 U. S. 251, this Court held that a state has a right by exemptions in its taxing system to foster a fair distribution of traffic between railroads and highway carriers. In *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, in dealing with a tax upon wholesale but not retail dealers in oil, this Court held that a purpose to encourage retail dealing was not objectionable. In *Barbier* v. *Connolly,* 113 U. S. 27, it is said (p. 31) that no amendment to the Constitution "was designed to interfere with the power of the State, sometimes termed its 'police power' . . . . to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity." While this language related primarily to the police power, it was cited in *Pacific Express Co.* v. *Seibert,* 142 U. S. 339, at 354, and quoted in *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, at 238, in support of the taxing power, and in the *Bell's Gap* case it was held that the Fourteenth Amendment was not to be given a construction which "would render

nugatory those discriminations . . . . . which are necessary for the encouragement of needed and useful industries," (134 U. S. at 237) language which is quoted in *Pacific Express* v. *Seibert*, 142 U. S. 339, at 352, and in *Citizens Telephone Co.* v. *Fuller*, 229 U. S. 322 at 329.

The legislative purpose to encourage, approved in the foregoing cases, had no necessary relation to other states. But in *New York* v. *Roberts*, 171 U. S. 658, this Court in dealing with a franchise tax imposed by New York upon certain corporations said, (pp. 665-666)

> "It is said that the operation of that portion of this taxing law which exempts from a business tax corporations which are wholly engaged in manufacturing within the State of New York, is to encourage manufacturing corporations which seek to do business in that state to bring their plants into New York. Such may be the tendency of the legislation, but so long as the privilege is not restricted to New York corporations, it is not presumed that thereby any ground is afforded to justify the intervention of the Federal Courts."

In *National Union Fire Ins. Co.* v. *Wanberg*, 260 U. S. 71, 75, a statute which bore heavily on foreign insurance companies was held to be valid "however wise it may be for a legislature to give weight to such a consideration in securing the use of foreign capital for its people."

It has never been supposed that a state is forbidden to ameliorate its tax laws lest they induce an "embargo" (*Apts. Br. p.* 27) upon the movement of capital between the states. (See *Board* v *Illinois*, 203, U. S., 553.)

The credit exemption challenged in this case has its roots in a domestic policy for the avoidance of

double taxation. It is not to be nullified because residents of Vermont may find it more profitable to invest their money within the state than beyond its borders, nor because the wisdom of the policy may be challenged by argument and opinion of serious strength, (*Rast* v. *Van Deman*, 240 U. S. 342, 357) nor is it to be nullified by hypothetical and unreal possibilities, (*Pullman* v. *Knott*, 235 U. S. 23, 26) nor by abstract theories or thinking up objections, (*Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, 22.)

When a state tax law is challenged under the Federal Constitution, "the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. .... the controlling test is to be found in the operation and effect of the law as applied and enforced by the state." (*St. Louis S. W. Ry. Co.* v. *Arkansas*, 235 U. S. 350, 362, 363; *Texas* v. *Brown*, 258 U. S. 466, 479; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 482; *Wagner* v. *Covington*, 251 U. S. 95, 102.) This Court considers, not the language of the state court, but the operation of the statute as construed and applied by the state court. (*Hope N. G. Co.* v. *Hall*, 274 U. S. 284, 288.)

The record is devoid of any evidence which indicates that any of the capital of appellant, or any capital of any other resident of Vermont, has been driven from other states into Vermont, or unreasonably retained within Vermont, by reason of the provisions of the challenged tax law; nor is there any evidence from which a tendency in that direction can be deduced.

From the foregoing it is apparent that the challenged exemption of credits is within the established right of the state to avoid double taxation of property rights within its jurisdiction; that its purpose to encourage investments by removal of tax barriers was within its legitimate powers; that the exemption is not

shown to have so operated as to achieve forbidden purposes. It is therefore not the exercise of any power prohibited by the constitution to the states.

The other exemption which appellant challenges is the provision exempting corporate dividends proportionately to the payment of taxes in this State by the corporation.

The effect of the income and franchise tax law, (*Pub. Laws of Vt.* (1933) *Chap.* 39, 40 & 41; *No.* 17, *Acts of* 1931) as applied to corporate dividends is to tax all corporations, whether domestic or foreign, at the rate of 2% as to income attributable to business within Vermont, (*Ib., Chap.* 40, *Sec.* 888. *See Apt's Br. p.* 5) and to tax resident shareholders at the rate of 4% upon the whole or a proportional part of dividends received from corporations, (again whether domestic or foreign) attributable to business outside of Vermont and thus untaxed by the Vermont franchise tax. (*Ib. Chap.* 39, *Sec.* 873, *II*, (*e*). *See Apt's. Br. p.* 4.)

The appellant seems to admit the right to exempt from taxation shares of stock when the corporation has borne the tax burden imposed by the State. He complains that the Vermont statute discriminates against resident investors who place their wealth outside the State; that this discrimination operates inexorably in every case.

But an exemption of shares of stock, complete or partial, under the Vermont income tax law arises out of the imposition of a franchise tax upon the corporation. The imposition of a franchise tax is conditioned and proportioned upon business within the State. The locus of a corporate business is by fair inference the locus of its principal property.[12]

All the tangible property of corporations within the state is taxed at the local rate (*Pub. Laws of*

[12]See cases cited *supra* p. 13, note 5.

Vt. §§ 571, 588.) Both the report of the State Tax Commissioner to the Legislature and the United States Census show that this rate is about 3%. It[13] follows that in general the exemption of stock in corporations is conditioned upon the payment by the corporation of a property tax substantially proportioned to the extent of the exemption.

Entirely apart from any franchise tax, the payment of the property tax would justify the exemption of the stock from a similar property tax. (*Kidd* v. *Alabama; Darnell* v. *Indiana; Klein* v. *Supervisors; Lawrence* v. *State Tax Commission, all cited supra.*)

But by the Vermont tax laws the income tax is substituted for the property tax upon shares of stock.[14] The income tax is therefore in effect a tax upon the shares. See *Pollock* v. *Farmers Loan & Tr. Co.*, 157 U. S. 429, 581; *Weston* v. *Charleston*, 27 U. S. (2 Pet.) 449; *Railroad Co.* v. *Jackson*, 7 Wall. 262; *Opinion of Justices*, 220 Mass. 613; *Wright* v. *Georgia R. R.*, 216 U. S. 420.

It follows that wholly irrespective of the franchise tax, the income from shares of corporations doing business in Vermont may fairly be exempted from taxation, in proportion to business within the state, as the statute in effect provides.

But the statute imposes an additional condition that the corporation shall pay in addition to its property tax a franchise tax at the rate of 2% upon its entire net income attributable to business within the state. It is obvious that in the ordinary case the net income of the corporation will exceed the distribution of dividends; that, therefore, the 2% tax will be applied to a wider base than the 4% tax. The excess of burden upon a stockholder who pays a 4% dividend

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[13]See *supra* p. 16, note 8.

[14]See discussion, *supra*, p. 15.

tax can never exceed 50% of his tax paid, and will generally be less. Entirely apart from the property tax, the franchise tax presents a disproportion to the taxation of shares not materially different than that sustained by this court in *Klein* v. *Board of Supervisors*, 282 U. S. 19, under a statute where corporate stock was exempted if there was subjected to the tax laws of the state as little as 75% of the corporate property with a valuation of 75% of its true value.

When the franchise tax and the property tax are considered together the result is that almost, if not quite, without exception, income from shares of stock will be exempted only when the corporation has paid a tax much in excess of the tax exacted upon the income of non-exempt shares.

Appellant's whole argument is based upon the fallacy that the exemption condition, of subjection to the franchise tax, entails only a payment of that tax. In fact, it entails the payment of general property taxes at a rate fifteen times as great. When the full consequences of the condition are considered the whole argument falls.

It thus clearly appears that the state court did not err in denying the claims of appellant that his privileges and immunities as a citizen of the United States had been abridged and that he had been deprived of his property without due process of law, and denied the equal protection of the laws.

APPELLANT'S POINT II.

It is urged by appellant in *Point II* of his Brief (*Br. p.* 27) that the Income and Franchise Tax Law places a burden upon interstate commerce which amounts to an embargo, both because of the rate differential between the tax on corporate franchises and the tax on dividends, and more especially because interest from money loaned at or under 5% per annum

within Vermont is exempt and the interest from money similarly loaned elsewhere is taxed.

What has already been said in regard to Appellant's *Point 1* is equally apposite in this connection. The exemptions as to of dividends and money loaned in Vermont at 5% or less is an attempt to avoid double taxation. This result is measurably accomplished by the taxing system of the State. Any inequalities which may exist in specific cases are purely fortuitous, the result of the impossibility of creating a taxing system achieving mathematical certainty and ideal equality. But aside from the sustaining effect of the ultimate fairness and equality of this tax law, it is submitted that there is nothing in the record upon which it can be held that there is any interstate commerce question involved in this case or that any of appellant's investments were transactions in, or having the nature of, interstate commerce.

Appellant, to support his claim of burden on commerce, relies upon the combined effect of *Northwestern Mutual Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132 and *New Jersey Telephone Co.* v. *Tax Board*, 280 U. S. 338, 346; but they have no such tendency. In the *Wisconsin* case the question undecided, to which appellant refers, arose not out of the normal characteristics of loans or of purchases of stock in other states, but out of the manner in which a huge volume of "foreign investment business" was conducted, constituting as it did one of the main activities of a large corporation, involving interstate shipment of securities etc. The question undecided was not as to the general rule that investments are not interstate commerce, but rather as to whether the general rule applied in such a case.

The *New Jersey* case applies to telephone companies the familiar rule that a state may not burden interstate commerce by taxation, whatever the instrumentalities or means employed in imposing the tax.

Whatever resemblance there is between a citizen's out-of-state investments and communication by telephone and telegraph, this Court has invariably distinguished between them. The rule that loans and investments are not, ordinarily at least, interstate commerce, is firmly established by analogy and by direct decision.

Insurance contracts, though between citizens of different states, are not interstate commerce. (*Paul* v. *Virginia*, 8 Wall. 168; *Hooper* v. *California*, 155 U. S. 648; *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495; *National U. Fire Ins. Co.* v. *Wanberg*, 260 U. S. 71, 75; *Bothwell* v. *Buckbee*, 275 U. S. 274.) Advertising contracts are not. (*Blumenstock* v. *Curtis Pub. Co.*, 252 U. S. 436.) Nor is interstate credit eporting. (*U. S. F. & G. Co.* v. *Kentucky*, 231 U. S. 394.) Nor is the business of an emigrant agent. (*Williams* v. *Fears*, 179 U. S. 270.) Nor is purchase by a citizen of one state of real property in another. (*Munday* v. *Wisconsin Tr. Co.*, 252 U. S. 499.) Nor is making promissory notes for interstate transmission, creating interstate credits and resulting in interstate payments. (*Graniteville Mfg. Co.* v. *Query*, 283 U. S. 376.) Nor is dealing in bills of exchange drawn between the states. (*Nathan* v. *Louisiana*, 8 How. 73.) Nor is the purchase of commercial paper in another state. (*Hemphill* v. *Orloff*, 277 U. S. 537.) Nor is the purchase or sale of securities in one state by or for a resident of another. (*Hatch* v. *Reardon*, 204 U. S. 152.) Or commodities. (*Broadnax* v. *Missouri*, 219 U. S. 285.) Nor is the acceptance of deposits for transmission abroad foreign commerce. (*Engel* v. *O'Malley*, 219 U. S. 128.) The decisions cover the whole range of contractual relations, creation of credits and acquisition of securities in a state by a citizen of another state.

The purchase of securities is essentially local in character, (*Hall* v. *Geiger-Jones Co.*, 242 U. S. 539; *Hatch* v. *Reardon*, *supra*,) and the lending of money,

(*Graniteville Mfg. Co.* v. *Query, supra, Hemphill* v. *Orloff, supra,*) and the making of contracts, (*Hooper* v. *California; New York L. I. Co.* v. *Deer Lodge County,* both *supra.*) The possibility that some interstate shipment or commerce will ensue is insufficient to change the character. (*Moore* v. *New York Cotton Ex.* 270 U. S. 593; *Broadnax* v. *Missouri, supra*; see also *Heisler* v. *Thomas Col. Co.*, 260 U. S. 245; *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249.)

Appellant is taxed upon certain credits due from non-residents and upon dividends from corporations not doing business in Vermont. The record, however, is barren of any showing that these loans or purchases of securities were made from Vermont or elsewhere than in the state of the domicile of the debtor or the corporation; or that credits or funds or correspondence moved from Vermont, or that anything has or will be transmitted in interstate commerce. The silence of the record is particularly significant in view of the fact that appellant, though a resident of Vermont, is a stockbroker and a member of a New York business partnership. (*Rec. p.* 6*A*, *Ex. A*, *Question* 3.) Since loans without the State and ownership of securities without the State are not necessarily interstate commerce and there is no showing that the transactions taxed to appellant involved interstate commerce, appellant's Constitutional rights are not affected and he is not entitled to be freed from the tax imposed.

Darnell v. *Indiana*, 226 U. S. 390;

First Natl. Bank of Shreveport v. *Louisiana Tax Com.*, 289 U. S. 60, 65;

Brown-Forman v. *Kentucky*, 217 U. S. 563.

Moreover, if interstate commerce were involved this taxing statute is not thereby rendered invalid.

The thing taxed is the receipt and enjoyment of income in Vermont.

See *Lawrence* v. *State Tax Com.*, 286 U. S. 276;
U. S. Glue Co. v. *Oak Creek*, 247 U. S. 321, 328;
Armour v. *Virginia*, 246 U. S. 1, 7.

Appellee therefore submits that there was no error in the ruling of the State Court that no interference with interstate or foreign commerce results from the challenged statute.

APPELLANT'S POINT III.

If the exemptions challenged should be held invalid, the immediate result would be the excision of such exemptions from the statute.

Pub. Laws of Vt. (1933) § 917;
Utah Power & Lt. Co. v. *Pfost*, 286 U. S. 165, 184;
Attorney General v. *Rutland Ry. Co.*, 86 Vt. 328.

The appellant, who had been discriminated against through the exemption of others in violation of the Federal law, would be entitled to equal treatment. While appellant is not required either himself to seek an increase in the taxes of others nor await the delayed action by state officials upon their own initiative, yet, if the income tax law is enforced, without the exemptions which may he held invalid, appellant should be subject to reassessment equally with others of the same class, even though the reassessment is by virtue of any additional legislation.

Graham v. *Goodcell*, 282 U. S. 409;
United States v. *Heinszen*, 206 U. S. 370;

Rafferty v. *Smith*, 257 U. S. 226, 232;
Seattle v. *Kelleher*, 195 U. S. 351;
Bellows v. *Weeks*, 41 Vt. 590;
Smith v. *Hard*, 59 Vt. 13;
Durkee v. *Barre*, 81 Vt. 530.

If the income tax law be held invalid because of the alleged discrimination, the invalidity applies as well to the preceding intangible tax law, thereby restoring the operation of the general property tax upon credits and dividends not lawfully exempt. Nothing in this decision ought to prevent the assessment of appellant equally with others of his class at such time and in such manner as might be warranted by the state law, within the limits of the federal constitution, even though the result is that all in petitioner's class will be subjected to more burdensome taxation than that imposed by the challenged statute.

APPELLANT'S POINT IV.

Appellant here raises question with respect to a tax of $32 which was exacted from him by reason of the denial of a personal exemption of $800. Appellant challenges the statutory provision permitting the deduction of $800 to a husband and wife, but only if they shall receive no income from any source other than "from the ownership of or interest in any stock, bond, note or other interest bearing security". (*Pub. Laws* 873, *subd. II* (*f*) 2.) This group of income (denominated by the Commissioner in administration *"Class B Income"*) is throughout the act differentiated from income from personal services, trades, business, commerce and net rentals from real and personal property (denominated by the commissioner in administration *"Class A Income"*). A separate and larger exemption is authorized with respect to Class A Income (*Pub. Laws.* 880, *subds.* (*a*) (*b*) & (*c*)).

Exemption of funds needed for the support of an average family are provided in all income tax laws. Some exemption of this sort has occurred in all the Federal income tax laws.[15]

The basis of such exemption is "to exclude from taxation the living expenses of an average family and thus to enable the poor man to escape becoming a public burden." (*Peacock* v. *Pratt*, (C.C.A. 9) 121 F. 772; *Black, Inc. and Other Fed. Tax.*, 4th ed. §133; and see dissenting opinion of Harlan, J. in 158 U. S. at 675.)

Certainly there is no obligation upon the legislature to provide two exemptions on account of family subsistence. A taxpayer with a subsistence exemption from one class of income is not subjected to unjust discrimination because he is not permitted to take an exemption from another class, any more than a taxpayer would be entitled to an exemption of two homesteads because he occupied alternately two places of residence. If the taxpayer had other than Class B Income, his need was less than that of the taxpayer who had no income in addition to Class B Income, and generally, he would have availed himself of an exemption from his Class A Income. In any aspect there is a substantial difference between income from intangibles and income from business and rents. All taxpayers are classified by the same criteria, having a real relation to the purpose and object of the exemption. It cannot be said that no "state of facts reasonably can be conceived that would sustain" such a classification. (*Rast* v. *Van Deman*, 240 U. S. 342, *State Board* v. *Jackson*, 283 U. S. 527 both cited *supra*,) or that the law

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[15] Section 216c of the Acts of 1918, 1921, 1924, 1926 and Sec. 25c of the Acts of 1928 and 1932.

In the dissenting opinion by Harlan, J. in *Pollock* v. *Farmer's Loan & Trust Co.*, 158 U. S. 601, 675, he says that such an exemption was allowed in the income tax laws of 1861 and in subsequent laws and was never questioned.

precludes the assumption that the classification was made in the exercise of legislative judgment and discretion. (*Stebbins* v. *Riley*, 268 U. S. 137, 143 cited *supra.*) Or that there is between the classes no ground of difference "having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (*Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 160 cited *supra.*)

The wisdom of such a classification may be opposed by argument and opinion of serious strength without invalidating the classification. (*Rast* v. *Van Deman, supra.*) Inequalities and discriminatory results from the minutiae of tax exemptions is not uncommon. A wide variety of such hypercritical objections to the Federal income tax law was considered by this Court and rejected in *Brushaber* v. *Union Pacific*, 240 U. S. 1, 23-25, and a provision with a considerable similarity to the one here challenged was sustained in *McPherson* v. *Fisher*, 143 Ore. 615, 23 P. (2d) 913. "The problems of government . . . may justify, if they do not require rough accommodations,—illogical it may be, and unscientific (*Salomon* v. *State Tax Com.*, 278 U. S. 484, 491; *Metropolis Theatre* v. *Chicago*, 228 U. S. 61, 69, 70). "Mere inequalities or exemptions in the matter of state taxation are not forbidden by the Federal Constitution" (*Beers* v. *Glynn*, 211 U. S. 477, 485.)

Apart from the foregoing, it should be noted that the $800 claimed exemption was not reported because "the reporting thereof would have been either uncalled for or ineffective under the terms of the official form." (*Rec. p.* 12, *lines* 4-5; *p.* 14 [*fols.* 24-25,] *par. No.* "1".)

Although the wife is entitled to claim all or any part of the exemption, and it appears (*Rec.* 6-*a*, *Exhibit A*) that she filed a separate return, it does not appear whether she claimed all or any part of the exemption. In view of this situation, reversible error did not appear in the record in the Court below and does not appear in the record here.

APPELLANT'S CONCLUSION.

Appellant argues that the invalidity of the challenged exemptions would destroy the entire statute, notwithstanding its severability clause. This is, of course, a different question than the right of appellant to be protected from unequal taxation discussed under Point III.

In *Field* v. *Clark*, 143 U. S. 649, 696-697, it was said:

> "Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. A different rule might be disastrous to the financial operations of the government, and produce the utmost confusion in the business of the entire country."

In *Utah Power & Lt. Co.* v. *Pfost*, 286 U. S. 165, 184, 185, it was held that exemptions from a license tax on the generation of electricity, which were held to be invalid, could properly be eliminated without the destruction of the act. In *Western Union Tel. Co.* v. *Texas*, 105 U. S. 460, 466, and in *Oklahoma* v. *Wells Fargo*, 223 U. S. 298, 302, it was held that whether the statute could be construed as severable of course would be ultimately for the state court.

In the case at bar the purpose of the legislature to tax income generally ought not to be rendered wholly inoperative because of any defect in lines of demarcation exempting income because the property was once taxed or because of discriminatory provisions as to subsistence exemptions.

Appellee submits that the challenged exemptions are not violative of the rights of appellant as a citizen of the United States and do not involve the exercise by the State of Vermont of any power prohibited to the states.

Lawrence C. Jones,
Attorney General.

Guy M. Page,
Counsel for Appellee.

Seymour P. Edgerton,
Of Counsel.

APPENDIX

Provisions in the laws of various states wherein exemption from taxation is given to money due or to become due when the debt is secured by real estate or chattel mortgage, or wherein exemption is given to credits evidenced in various forms.

In the following states exemption has been given to loans or obligations secured by mortgage of property within the jurisdiction, in some instances of real property only and sometimes including chattels; and in some instances including money, credits, etc. though unsecured.

COLORADO

Compiled Laws, 1921, § 7195.

Property includes real, personal and mixed tangible property, rights, credits and intangibles.

> "*Provided*, that where any property within this state is mortgaged, conveyed or pledged for the security of a loan or debt then owing the said property and the notes . . . (etc.) . . . shall be assessed as a unit . . . . and as of one value, and as the value of said property so mortgaged . . . only, and any such notes . . . (etc.) . . . shall not be otherwise returned or assessed."

In *Washington County* v. *Murray*, 71 Colo. 522, the foregoing exemption was held not to violate a constitutional provision that all property shall be taxed. If both real estate and mortgage are taxed, the tax is double.

CONNECTICUT

General Statutes, Revision of 1930, *Sec.* 1174.

> Sec. 1174. *Exemption of money loaned on mortgages in certain cases.* Money loaned on interest and secured by a mortgage of real estate in the state shall be exempt from taxation to an amount equal to the assessed value of the mortgaged real estate in the assessment list of a town, city, borough or other taxing district in which it shall be situated, but the excess of any such loan over such valuation shall be assessed and taxed in the town, city, borough or other taxing district in which such mortgaged real estate shall be situated."

Skilton v. *Colebrook*, 76 Conn. 666, contains a comprehensive discussion of the history of Connecticut's method of dealing with credits for tax purposes, disclosing a general intent to avoid double taxation of the same values.

LOUISIANA

Constitution, 1921, *Art.* X, *Sec.* 4 as amended.

> "The following property, and no other, shall be exempt from taxation; . . . Cash on hand or on deposit, loans or other obligations secured by mortgage on property located exclusively in the State of Louisiana, and the notes or other evidence thereof . . ."

Cited in *State* v. *Jefferson Finance Co.*, 163 La. 1005, 113 So. 355, holding that the exemption does not relieve a firm dealing in such loans from the license tax, and in *Bemis Bro. Bag Co.* v. *Louisiana Tax Comm.*, 158 La. 1, 103 So. 337, holding that this provision does not exempt credits on book accounts.

MAINE

Revised Statutes, 1930, *c.* 13, *Sec.* 6, XIII, *p.* 259.

Exemptions:

> "All loans of money made by any individual or corporation and secured by mortgage on real estate situated in this state."

This subsection was first enacted in 1911 and has never been construed.

MASSACHUSETTS

General Laws, Ter. Ed. c. 59, *sec.* 4.

> "Personal estate, for the purpose of taxation shall include . . . money at interest, and other debts due the person to be taxed more than he is indebted or pays interest for, but not including in such debts due . . . any loan on mortgage of real estate, taxable as real estate, except the excess of such loan above the assessed value of the mortgaged real estate . . ."

In *United States Trust Co.* v. *Comm.* (1923) 245 Mass. 75, 139 N. E. 794, it appeared that some assets of the trust company were in notes payable to it, secured by notes of others endorsed to it, those notes in turn being secured by real estate mortgages assigned to it and recorded. The company's franchise tax is determined by fair cash value of the shares less the value of real estate subject to local taxation.

It was held that these notes for tax purposes are real estate, and should be deducted. The court said, at p. 77:

> "The design of the General Court in enacting these statutes was to prevent that which in substance and effect was double taxation upon land."

This was expressed in the title of the original act (*St.* 1881, *c.* 304) and is the necessary result of taxing the land and the credit.

MONTANA

Revised Codes of Montana, 1921, *sec.* 1998.

> "1998. Exemptions from taxation. . . . . evidences of debt secured by mortgages of record upon real or personal property in the state of Montana . . . . "

State v. *Jones*, 80 Mont. 574, 261 P. 356 (1927) held that an inheritance tax was not upon property and the above exemption did not apply to such a tax.

Bank of Miles City v. *Custer County*, (1933) 93 Mont. 291, 19 P. (2d) 885, contains a reference to this provision in connection with the taxation of a state bank.

OREGON

Oregon Code Ann. 1930, *sec.* 69-104, *Vol.* 3, *p.* 5303.

> "69-104. Exempt property.
>
> 9. All notes secured by recorded mortgages on real property." (Deleted by amendment in 1931.)

A former Oregon statute taxing the mortgage debt as a part of the real estate was sustained in this Court. *Savings & L. Soc.* v. *Multnomah County*, 169 U. S. 421.

UTAH

Constitution, Art. 13, *sec.* 3 (Prior to Amendment of Nov. 4, 1930).

> ". . . Provided further, That mortgages upon both real and personal property shall be exempt from taxation . . . "

McLaughlin v. *Cluff*, 66 Utah 245, 240 P. 161, raised the question of taxability of foreign held bonds passing by devise. The court says at p. 255:

> "So far as general taxation is concerned, it has always been the policy of the people of this state to exempt mortgages from taxation, whether held by residents or non-residents." (citing Const. above.)
>
> "If a tax is imposed upon such mortgages, the borrowers who are the people of this state, must themselves pay the tax which will be represented in increased interest rates."

WYOMING

Wyoming Revised Statutes, 1931, *Sec.* 115-107.

> "Mortgages exempt. All mortgages upon property within the state of Wyoming, whether real or chattel, together with the indebtedness thereby secured, shall be exempt from taxation; provided that the mortgaged property, whether real or personal, shall be taxed at its true value in money."

No case has been found dealing with this exemption.

In the following states varying provisions permit the exemption of notes, credits, loans, etc. or one or more of them generally, or in some limited form, either to avoid double taxation or to promote development of real estate.

INDIANA

Burns Indiana Statutes Ann. 1933. *Sec.* 64-209 (14043) *Vol.* 11, *p.* 512.

> "Any person being the owner of real estate liable for taxation with (within) the state of

Indiana, and being indebted in any sum secured by mortgage upon real estate, may have the amount of such mortgage indebtedness, not exceeding one thousand dollars ($1000) existing and unpaid upon the first day of March of any year, deducted from the assessed valuation of mortgage premises for that year, ... Provided, that no deduction shall be allowed greater than one-half of such assessed valuation of such real estate." (Acts 1919, Ch. 59, sec. 57)

Sustained as constitutional in *State v. Smith*, 158 Ind. 543, 63 N. E. 25, 64 N. E. 18, citing *Savings & Loan Soc.* v. *Multnomah County*, 169 U. S. 421. The Indiana Court said:

> "But if A sells a tract of land to B for $1,000, and takes a mortgage back for the entire purchase money, and if the mortgagee be a resident of this state, there is brought into existence, in the absence of the enactment in question, additional taxable property to the value of $1,000, although it is apparent that by such a transaction the state's wealth has not been increased a farthing."

MISSISSIPPI

Mississippi Code 1930 (*Ann.*), *Ch.* 61, *sec.* 3108 (v).

> "The following shall be exempt from taxation:
>
> (v) . . . all notes and evidences of indebtedness bearing a rate of interest not greater than six per cent per annum, and all money loaned at a rate of interest not exceeding six per cent per annum . . ."

No case has been found dealing with this provision.

NEW YORK

Birdseye's Consolidated Laws of New York, 2 ed. vol. 8, pp. 8581 ff; Tax law, secs. 251, 253.

New York imposes a recording tax of 50¢ per $100 of principal debt or major fraction thereof, (sec. 253) and exempts all mortgages and the obligations which they secure from state or local taxation (sec. 251) (except bank share tax, insurance company franchise tax, trust company and savings bank franchise tax, and transfer tax.)

This section does not protect mortgage interest against income tax. *Clyde* v. *Gilchrist*, 262 U. S. 94.

Sec. 251 was repealed by *Laws* 1933, *c.* 470.

NORTH CAROLINA

Constitution, Art. V, *Sec.* 3 (As amended in 1920).

All real and personal property shall be taxed according to its true value in money

> "*Provided*, notes, mortgages and all other evidences of indebtedness or any renewal thereof, given in good faith to build, repair or purchase a home, when said loan does not exceed $8,000 and . . . (is) . . . made to run for not less than one nor more than thirty-three years, shall be exempt from taxation of every kind for fifty per cent of the value of the notes and mortgages, . . ."

provided the holder lives in county where land lies and lists it there.

PENNSYLVANIA

Purdon's Penna. Statutes Ann., Title 72, *sec.* 4731. (Apr. 4, 1868; P. L. 61, sec. 1).

> "All mortgages, judgments, recognizances and moneys owing upon articles of agreement

for the sale of real estate . . . . shall be exempt from all taxation except for state purposes:"

This section does not apply to corporate obligations, and only to certain enumerated counties.

The title of this act was "An Act to promote the improvement of real estate."

The words "for the sale of real estate" are confined to "articles of agreement" for the sale thereof.

> "The exemption of mortgages is general because they encumber real estate, and by relieving the land from the tax which the mortgagee may by law add to his interest without usury, the ability of the mortgagor to improve his real estate is increased."

Westmoreland County v. *Fries*, 80 Pa. 51.

WASHINGTON

Remington's Compiled Statutes, 1927 *Supp.*, *sec.* 11097-5, *p.* 1424.

> ". . . Mortgages, notes, accounts, certificates of deposit, tax certificates, judgments, state, county, municipal and taxing district bonds and warrants shall not be considered as property for the purpose of this act, and no deduction shall hereafter be made or allowed on account of any indebtedness owed."

The above statute formerly included "monies" and to that extent violated a state constitutional requirement that all property be taxed.

This was held in *State ex. rel. Wolfe* v. *Parmenter*, 50 Wash. 164.

The court further said, pp. 175, 176: "The multiplicity of credits does not add to the property wealth

of the state. . . . To tax both the right and the property it represents is clearly double taxation."

WISCONSIN

Wisconsin Statutes, 1933, *Ch.* 70, *Sec.* 70.11.

"70.11 Property exempt from taxation. (10) All moneys or debts due or to become due to any person, and all stocks and bonds . . . . not otherwise specially provided for."

This statute apparently came in with the income tax law. Previously the state had taxed the excess of solvent credits over debts owing.

It thus appears that with respect to state legislation, state courts have held that to tax both the property and the debt is double taxation and not required.

Washington County v. *Murray*, 71 Colo. 522, (p. 36 *supra*);
Skilton v. *Colebrook*, 76 Conn. 666, (p. 37 supra.)
U. S. Trust Co. v. *Comm.*, 245 Mass. 75 (p. 38 *supra*);
McLaughlin v. *Cluff*, 66 Utah 245, (p. 40 *supra*)
State v. *Smith*, 158 Ind. 543, (p. 41 *supra*)
Westmoreland County v. *Fries*, 80 Pa. 51, (p. 43 *supra*).

"The multiplicity of credits does not add to the property wealth . . . . To tax both this right and the property which it represents is clearly double taxation."

State ex rel. Wolfe v. *Parmenter*, 50 Wash. 164, 175, 176.

And see

People v. *Hibernia Bank*, 51 Calif. 243,
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Statistical Abstract of the United States (1922) pp. 630-631	16n
Commission to Investigate Double Taxation (Vermont) p. 90	16n
Vermont State Tax Commissioner's Report 1914, pp. 309, 310	16, 16n
1932, pp. 92-114	16n

Text Book

Black, Inc. and other Fed. Tax., 4 ed. Sec. 133	32

SUPREME COURT OF THE UNITED STATES.

No. 8.—October Term, 1935.

James C. Colgate, Appellant,
vs.
Erwin M. Harvey, Tax Commissioner of the State of Vermont.

Appeal from the Supreme Court of the State of Vermont.

[December 16, 1935.]

Mr. Justice Sutherland delivered the opinion of the Court.

The Vermont Income and Franchise Tax Act of 1931, Public Laws of Vermont, 1933, § 872 *et seq.* (the pertinent provisions of which are copied in the margin[1]), imposes individual income taxes as follows: First, with respect to net income derived from salaries, wages, etc., denominated by the court below class A income, at the rate of 2%; second, with respect to income received on account of the ownership or use of or interest in any interest bearing security, denominated class B income, at the rate of 4%, excluding, however, from such income (a) interest received on account of *money loaned within the state* at a rate of interest not exceeding 5% per annum,

"Chapter 39.

[1] "Sec. 873. *Rate; Exemptions; Amount.*—A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually, with respect to:

"I. His net income as herein defined, after deducting the exemptions provided in this chapter, at the rate of two per cent; and

"II. To the income received by him on account of the ownership or use of or interest in any stock, bond, note, agreement or other interest bearing security at the rate of four per cent; but the words 'income received by him on account of the ownership or use of or interest in any stock, bond, note, agreement or other interest bearing security' shall not include the following items which shall be exempt from taxation under this chapter:

"(a) Interest received on account of money loaned within this state, at a rate of interest not exceeding five per cent per annum evidenced by a promissory note, mortgage on real estate or a bond for a deed, including credits representing the purchase price, or any part thereof, of real estate within this state, sold or transferred, evidenced by a promissory note, mortgage or bond for a deed bearing a rate of interest not exceeding five per cent per annum;

"(e) Dividends on stocks of those corporations which are subject to taxation under chapter 40, but if a corporate franchise tax is not measured by the entire net income of such corporation, then a portion of the dividends paid by such corporation shall be taxable under this chapter, and such taxable portion shall be that proportion of the dividend as the income earned by the

evidenced by a promissory note, mortgage, or bond for a deed bearing a like rate of interest; (b) dividends on stocks of corporations ~~not~~ subject to taxation under Sections 887, 888 of the statute. If the income taxed is derived wholly from interest-bearing securities, there is allowed in the case of a single individual, a personal exemption of $400, and, in the case of a head of a family or of a married individual living with husband or wife, a personal exemption of $800. If, however, either husband or wife shall receive any income other than that derived from such securities, then the personal exemption is not allowed. A distinct and larger personal exemption is allowed in the case of net income derived from salaries, wages, etc. (§ 880)—namely, $1,000 in the case of a single individual, and $2000 in the case of a head of a family or a married individual living with husband or wife.

Appellant is a resident of Vermont, married and living with his wife. During the taxable year in question, he received both

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corporation from business done without the state of Vermont bears to the entire income of the corporation;

"(f) In case the income taxed in this section is derived wholly from ownership of or interest in any stock, bond, note or other interest bearing security, there shall be deducted from such income the following exemptions:

"1. In case of a single individual a personal exemption of four hundred dollars;

"2. In the case of the head of a family, or a married individual living with husband or wife, a personal exemption of eight hundred dollars; but if either a husband or wife shall receive any income other than that derived from the ownership of or interest in any stock, bond, note or other interest bearing security, then such personal exemption shall not be allowed. A husband and wife living together shall receive but one personal exemption of eight hundred dollars against their aggregate net income; and in case they make separate returns, the personal exemption of eight hundred dollars may be taken by either or divided between them. . . .

"Chapter 40.

"Sec. 887. *Rate.*—For the privilege of exercising its franchise in this state in a corporate or organized capacity, every domestic corporation, and for the privilege of doing business in this state every foreign corporation, liable to tax under this chapter shall annually pay to this state a franchise tax to be measured by its net income to be computed in the manner hereinafter provided at the rate of two per cent upon the basis of its net income as herein computed for the next preceding fiscal or calendar year.

"Sec. 888. *Basis on business within the state.*—If the entire business of the corporation be transacted within the state, the tax imposed shall be based upon the entire net income of such corporation for such fiscal or calendar year. If the entire business of the corporation be not transacted within the state and its gross income derived from business done both within and without the state, the determination of its net income shall be based upon the business done within the state and for the purpose of computing such net income the commissioner shall adopt such recommendations and regulations for the allocation of net income as will fairly and justly reflect the net income of that portion of the business done within the state."

class A and class B income; but his class A income, although large, was absorbed by allowable deductions, so that there was no net income from that source, and consequently nothing subject to taxation. His class B income amounted to a larger sum, part of which consisted of interest on notes, mortgages, etc., representing money loaned outside the State of Vermont at not exceeding 5% per annum, and another part from taxable dividends received from corporations other than Vermont corporations. Upon these two sums a tax was assessed against him at the rate of 4%. Under the statute, he was allowed no personal exemption whatever.

The validity of the statute under the federal Constitution was properly challenged. The grounds of attack, so far as necessary to be stated, are as follows: (1) The act imposes a tax upon dividends earned outside the State of Vermont, while exempting from the tax dividends earned within the state, thereby denying petitioner the equal protection of the laws in violation of the Fourteenth Amendment; (2) the act, in violation of the same clause, discriminates in favor of money loaned within the state as against money loaned outside the state; (3) the act arbitrarily denies appellant the $800 exemption while giving it to other persons whose situation differed from his only in that they had no income from business, and thereby denies appellant the equal protection of the laws guaranteed by the Fourteenth Amendment; and in each of these three particulars the act abridges the privileges and immunities of appellant as a citizen of the United States in contravention of the same amendment.[2]

The court below denied the contentions of appellant and sustained the validity of the act in every particular. 107 Vt. 28.

First. Does the imposition of a tax upon dividends earned outside the state, from which tax dividends earned within the state are exempt, constitute, under the Fourteenth Amendment, an al-

[2]The further point is made that the discrimination in respect of dividends and interest upon loans is a regulation of interstate commerce and therefore void under the commerce clause of the federal Constitution. But we mention this latter claim only to reject it as without merit, since clearly a tax upon income is not an interference with interstate commerce simply because the income is derived from a source within another state; and, moreover, if there be any tendency to interfere with such commerce it is purely collateral and incidental. Nathan *v.* Louisiana, 8 How. 73, 82; Williams *v.* Fears, 179 U. S. 270, 276; Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611, 616; Anderson *v.* United States, 171 U. S. 604, 616; Engel *v.* O'Malley, 219 U. S. 128, 138; Moore *v.* N. Y. Cotton Exchange, 270 U. S. 593, 604.

lowable classification? The basis of the classification rests in the consideration that by sections 887 and 888 a tax of 2%, measured by net income, is imposed upon every corporation for the privilege of exercising its franchise in the state and of doing business therein. If the entire business of the corporation be transacted within the state, the amount of the tax is fixed with regard to the entire net income. If the entire business be not so transacted, the net income is calculated with respect to that part of the business done within the state, to be allocated so as fairly and justly to reflect such net income. Dividends upon shares of corporations which are subjected to this tax are exempted from the income tax. In addition to the 2% franchise tax, all tangible corporate property lying within the state is subjected to a property tax. The evident aim of the classification, therefore, is to produce equality and not inequality; and, obviously, that aim will become effective in fact, to a greater or less extent, in the administration of the legislation.

The theory upon which the tax is laid upon dividends realized from out-of-state business while leaving dividends realized from domestic business untaxed, is that the 2% franchise tax, especially with the property tax added, has the effect of indirectly imposing a tax burden upon the latter measurably equivalent to that imposed directly upon the former. Thus, the tendency of the plan is to avoid taxing twice what is, in effect, the same thing. And conceding the power of the state to impose double or even multiple taxation, legislation which is calculated to avoid that undesirable result certainly cannot be condemned as arbitrary. Thus far, the question is settled in favor of the validity of the tax by prior decisions of this court. *Kidd* v. *Alabama*, 188 U. S. 730; *Darnell* v. *Indiana*, 226 U. S. 390, 398; *Traveller's Ins. Co.* v. *Connecticut*, 185 U. S. 364; *Watson* v. *State Comptroller*, 254 U. S. 122, 124-125; *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 284. True, it well may be assumed that similar franchise and property taxes are imposed upon the outside corporations by other states; but the assumption is immaterial to the issue here involved. It is enough that such taxes are not imposed by the State of Vermont. It was so decided in *Kidd* v. *Alabama*; *supra*, where Mr. Justice Holmes, speaking for the court, said (p. 732):

"The State of Alabama is not bound to make its laws harmonize in principle with those of other States. If property is un-

taxed by its laws, then for the purpose of its laws the property is not taxed at all." And see *Bacon* v. *Board of Tax Com'rs*, 126 Mich. 22, 25-26.

Appellant urges that the franchise tax measured by the corporation's income is at the rate of 2%, while the tax on dividends is at the rate of 4%; and concludes that this results in putting a burden on dividends directly taxed twice as great as that imposed indirectly by the franchise tax. But it is obvious that, since the 4% tax is imposed only upon such part of the corporate net income as passes to the shareholders in the form of dividends, and the 2% tax is measured by the entire net income of the corporation, this conclusion is erroneous. Corporations do not, at least as a general rule, pay out their entire net income in dividends. Something is reserved for future contingencies; and it may well result that a tax of 2% measured by the entire net income of the corporation will roughly approximate the amount imposed by a 4% tax on that part of the net income paid out as dividends. There is nothing in the equality clause of the Constitution which requires that the two sums shall be mathematically equivalent. *Concordia Ins. Co.* v. *Illinois*, 292 U. S. 535, 547. In *Klein* v. *Board of Supervisors*, 282 U. S. 19, this court sustained an act exempting corporate shares from taxation where 75% of the total property of the corporation was taxable in the state and the taxes thereon were paid. It was said that this was plainly a reasonable effort to do justice to all in view of the way other assessments were made.

It is impossible to say from the record before us that there is a greater disproportion here than was presented in the *Klein* case, or to conclude that the disproportion is so great as to stamp the classification as wholly arbitrary or capricious. Moreover, as a general thing, a corporation subject to the 2% franchise tax will pay also a tax upon property located within the state, with the effect of still further narrowing, if not altogether extinguishing, the difference.

This court has frequently said that absolute equality in taxation cannot be obtained and is not required under the Fourteenth Amendment. This, of course, is not to say that, because some degree of inequality from the nature of things must be permitted, gross inequality must also be allowed. The boundary between what is permissible and what is forbidden by the constitutional requirement has never been precisely fixed and is incapable of exact delimitation. In the great variety of cases which have arisen, deci-

sions may seem to be difficult of reconcilement; but investigation will generally cause apparent conflicts to disappear when due weight is given to material circumstances which distinguish the cases. If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied. We think the provision now under consideration meets this test. Cf. *State Railroad Tax Cases*, 92 U. S. 575, 612; *Tappan* v. *Merchants' National Bank*, 19 Wall. 490, 504; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, 464.

Second. It is settled beyond the admissibility of further inquiry that the equal protection clause of the Fourteenth Amendment does not preclude the states from resorting to classification for the purposes of legislation. *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415. And "the power of the state to classify for purposes of taxation is of wide range and flexibility . . ." *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 37. But the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia, supra; Air-way Corp.* v. *Day*, 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240. The classification, in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones. The test to be applied in such cases as the present one is—does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation? "*Mere* difference is not enough . . ." *Louisville Gas Co.* v. *Coleman, supra; Frost* v. *Corporation Commission*, 278 U. S. 515, 522.

The question depends here upon whether the income taxed and the income exempted from taxation reasonably can be assigned to different classes. As the Supreme Court of Vermont itself has pointed out, in all such cases it must appear not only that a classification has been made, but that it is one based on some reasonable ground. *State* v. *Hoyt*, 71 Vt. 59, 64-66. The decision in that case held invalid a state statute the effect of which was to impose a tax upon sales of goods manufactured in the state, while leaving sales of goods manufactured in other states free from

taxation. It was held that the classification could not be based on any difference in the goods, because there was none; nor on the fact that they were made in different states, for that bore no just and proper relation to the classification, but was purely arbitrary; nor on the difference of residence of the manufacturers, for the same reason. And clearly the view of the court was that a like discrimination against the products of another state would have been open to the same objections.

Let us apply these principles to the statute creating the exemption now in question. Upon the face of the statute the classification is based upon a difference having no substantial or fair relation to the object of the act—which, so far as this question is concerned, simply is to secure revenue. The statute itself suggests no other public purpose which will be served by the exemption. The language creating the exemption is "(a) Interest received on account of money loaned within this state, at a rate of interest not exceeding five per cent per annum . . ." The naked and complete test afforded by the statute is that the money shall be loaned within the state. What is to be done with the money, whether it is to be invested in the state or elsewhere—indeed, whether it is to be devoted to any useful purpose—are matters having nothing to do with the imposition of the tax or the exemption therefrom. If the statute had provided that interest on account of money so loaned when invested in property having a situs within the state shall be free from the tax, a different question as to classification might be presented. In that event the actual wealth of the state would be increased, and in addition, and as a consequence, opportunity to obtain additional revenue through taxation would result. But this exempting provision, we repeat, contains neither this qualification nor any other. Its terms are positive and all-inclusive and will be fully satisfied whenever it appears that money has been loaned within the state. The Supreme Court of Vermont has not read into the statute a qualification that loans shall be deemed to be made within the state only if their proceeds be invested in the state. Obviously this court cannot so read the provision, for that would be to amend and not to construe it. We are unable to find in the provision any public purpose which can be subserved by making the taxation of income from loans dependent merely upon the adventitious circumstance as to the place of making the loan.

It is suggested, however, that, aside from anything in the statute, money loaned within the state generally will be invested therein. But there is nothing in the record to indicate that this will result; and for aught this court can know judicially, there is no warrant for saying either that it will or will not result. All we can say is that money so loaned *may be* invested in Vermont, or *may be* invested in some other state—for example, in property having a situs in New York—or may not be invested at all. If there be circumstances which will justify the exemption of any income derived from money loaned within the state while taxing the income from that loaned outside, it is for the state legislature to point them out and limit the exemption accordingly. To import any such circumstances into the present situation is to indulge in pure speculation. Compare *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, 81.

To assume that some unnamed public interest exists, which will sustain the discrimination, does not help the matter here; because the assumption can rest only upon surmise, with nothing concrete or explicit appearing to support it or to indicate a legislative intent to relate the exemption to any public purpose or to anything else beyond the mere fact that the favored loans are effected within the state. In principle, the classification is quite as arbitrary as that dealt with by this court in *Louisville Gas Co.* v. *Coleman*, *supra*, pp. 38-39. If the exemption had been made to depend upon the *time* when the loan was made, instead of upon the *locality* where it was made—as, for example, a tax upon all income from loans except those made on Mondays—the arbitrary and capricious nature of the classification would scarcely be doubted, although a minute inspection of the field of possibilities might persuade an anxious mind, bent on sustaining the tax at all events, to the view that in some far-fetched way a loan made on Monday would further some public purpose, other than that of revenue, which a loan made on another day of the week would not.

It is said that an exemption which may have for its aim the advancement of local interests can hardly be condemned under a Constitution which for a century has known a protective tariff. Considering the suggestion categorically, a pertinent answer to it is that while the general government may, for the benefit of national interests, exact impost duties which discriminate against foreign interests, one state, even for the advancement of its own interests, is not permitted to exact taxes discriminating against

goods brought from a sister state. See, for example, *Welton* v. *State of Missouri*, 91 U. S. 275; cf. *Burnet* v. *Brooks*, 288 U. S. 378, 401, *et seq.*

But, assuming that the State of Vermont is benefited by the exemption, the complete answer is that appellant is a citizen of the United States; and, quite apart from the equal protection of the laws clause, the suggestion is effectively met and overcome, and the fallacy of other attempts to sustain the validity of the exemption here under review clearly demonstrated, by reference to the privileges and immunities clause of the Fourteenth Amendment. "For all the great purposes for which the Federal government was formed", this court has said, "we are one people, with one common country." *Crandall* v. *State of Nevada*, 6 Wall. 35, 48-49. As citizens of the United States we are members of a single great community consisting of all the states united and not of distinct communities consisting of the states severally. No citizen of the United States is an alien in any state of the Union; and the very status of national citizenship connotes equality of rights and privileges, so far as they flow from such citizenship, everywhere within the limits of the United States. This fact is obvious and vital and no elaboration is required to establish it.

Section 2 of Article IV of the Constitution contains the provision, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Fourteenth Amendment, Section 1, provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . ."

Thus, the dual character of our citizenship is made plainly apparent. That is to say, a citizen of the United States is *ipso facto* and at the same time a citizen of the state in which he resides. And while the Fourteenth Amendment does not *create* a national citizenship, it has the effect of making that citizenship "paramount and dominant" instead of "derivative and dependent" upon state citizenship.[3] "In reviewing the subject," Chief Justice White said in

[3] In United States v. Hall, Case No. 15,282, 26 Fed. Cas. 79, 81, Judge Woods said: "By the original constitution citizenship in the United States was a consequence of citizenship in a state. By this clause this order of things is reversed. . . . and citizenship in a state is a result of citizenship in the United States."

the *Selective Draft Law Cases,* 245 U. S. 366, 377, 388-389, "we have hitherto considered it as it has been argued, from the point of view of the Constitution as it stood prior to the adoption of the Fourteenth Amendment. But to avoid all misapprehension we briefly direct attention to that [the Fourteenth] Amendment for the purpose of pointing out, as has been frequently done in the past, how completely it broadened the national scope of the Government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and therefore, operating as it does upon all the powers conferred by the Constitution, leaves no possible support for the contentions made, if their want of merit was otherwise not so clearly made manifest."

The result is that whatever latitude may be thought to exist in respect of state power under the Fourth Article, a state cannot, under the Fourteenth Amendment, abridge the privileges of a citizen of the United States, albeit he is at the same time a resident of the state which undertakes to do so. This is pointed out by Mr. Justice Bradley in the *Slaughter House Case,* 1 Woods 21, 28:

"The 'privileges and immunities' secured by the original constitution were only such as each state gave to its own citizens. Each was prohibited from discriminating in favor of its own citizens and against the citizens of other states.

"But the fourteenth amendment prohibits any state from abridging the privileges or immunities of citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired."

The same distinction is made by this court in *Bradwell* v. *The State,* 16 Wall. 130, 138, where, speaking of the privileges and immunities provision of the Fourth Article, it was said:

"The protection designed by that clause, as has been repeatedly held, has no application to a citizen of the State whose laws are complained of. If the plaintiff was a citizen of the State of Illinois, that provision of the Constitution gave her no protection against its courts or its legislation."[4]

But the court added that with respect to the Fourteenth Amend-

[4] This does not mean that a state has unlimited power by law to abridge the privileges of its own citizens. It only means that in such case we must look elsewhere than to the language of the privileges and immunities clause of the Fourth Article of the Constitution for the constitutional infirmity of the statute, if it have any.

ment "there are certain privileges and immunities which belong to a citizen of the United States as such; otherwise it would be nonsense for the Fourteenth Amendment to prohibit a State from abridging them, . . . We agree . . . that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge." The governments of the United States and of each of the several states are distinct from one another. The rights of a citizen under one may be quite different from those which he has under the other. To each he owes an allegiance; and, in turn, he is entitled to the protection of each in respect of such rights as fall within its jurisdiction. *United States* v. *Cruikshank*, 92 U. S. 542, 549.

Under the Fourteenth Amendment, therefore, the simple inquiry is whether the privilege claimed is one which arises in virtue of national citizenship. If the privilege be of that character, no state can abridge it. No attempt has been made by the courts comprehensively to define or enumerate the privileges and immunities which the Fourteenth Amendment thus protects.[5] Among those privileges, however, undoubtedly is the right to pass freely from one state to another. *Crandall* v. *State of Nevada, supra; Williams* v. *Fears*, 179 U. S. 270, 274. And that privilege, obviously, is as immune from abridgement by the state from which the citizen departs as it is from abridgement by the state which he seeks to enter. This results from the essential character of national citizenship. Cf. *In re Kemmler*, 136 U. S. 436, 448; *Duncan* v. *Missouri*, 152 U. S. 377, 382; *In re Quarles and Butler*, 158 U. S. 532, 536; *United States* v. *Cruikshank, supra*, at p. 552.

In the *Crandall* case, while the court at least gravely doubted whether a capitation tax imposed by the State of Nevada upon persons leaving the state by railroad or stagecoach violated the commerce clause (p. 43), it was distinctly held that the tax did affect the rights of citizens under the federal government so as to invalidate the act imposing the tax. The doubt as to the first point has been resolved in later cases against the power of the state (*Helson and Randolph* v. *Kentucky*, 279 U. S. 245, 251); but the ruling on the second point has never been doubted and was definitely ap-

[5] For examples, however, see Corfield *v.* Coryell, 4 Wash. C. C. 371, 380, 381; Slaughter-House Cases, 16 Wall. 36, 79-80; Twining *v.* New Jersey, 211 U. S. 78, 97; Ward *v.* Maryland, 12 Wall. 418, 430; Blake *v.* McClung, 172 U. S. 239, 248, 252; United States *v.* Wheeler, 254 U. S. 281; Paul *v.* Virginia, 8 Wall. 168, 180.

proved in the *Slaughter-House Cases*, 16 Wall. 36, 79, and the right described in the *Crandall* case placed among the partially enumerated privileges and immunities "which owe their existence to the Federal government, its National character, its Constitution, or its laws." The opinions in both cases were delivered by the same eminent justice; and it is not without significance that while the first opinion was delivered before the adoption of the Fourteenth Amendment, the second one was delivered afterwards and with direct reference to the privileges and immunities clause of that amendment. The fact that we have since decided, and should now hold, that the Nevada act was in violation of the commerce clause, in no way detracts from the view that it also violates the privileges and immunities clause; but simply demonstrates that the same act of state legislation may contravene more than one provision of the federal Constitution.

The right of a citizen of the United States to engage in business, to transact any lawful business, or to make a lawful loan of money in any state other than that in which the citizen resides is a privilege equally attributable to his national citizenship. A state law prohibiting the exercise of any of these rights in another state would, therefore, be invalid under the Fourteenth Amendment. The imposition by one state of a discriminating tax upon a citizen resident in another state for trading in the territory of the former has been held invalid. *Ward* v. *Maryland*, 12 Wall. 418, 430. And, of course, conversely, a tax of that description is likewise void if imposed by one state upon a resident citizen of the United States for trading or doing business in the territory of another state. And such a tax is not justified because the taxing state will thereby help its domestic business.

The purpose of the pertinent clause in the Fourth Article was to require each state to accord equality of treatment to the citizens of other states in respect of the privileges and immunities of state citizenship. It has always been so interpreted. One purpose and effect of the privileges and immunities clause of the Fourteenth Amendment, read in the light of this interpretation, was to bridge the gap left by that article so as also to safeguard citizens of the United States against any legislation of their own states having the effect of denying equality of treatment in respect of the exercise of their privileges of national citizenship in other states. A provision which thus extended and completed the shield of national protection between the citizen and hostile and discriminating state legislation cannot be lightly dis-

missed as a mere duplication, or of subordinate or no value, or as an almost-forgotten clause of the Constitution.

Reference has been made to numerous cases in which this court has rejected or ignored specific claims under the privileges and immunities clause; but since none of them relates to state legislation even remotely resembling the Vermont law here challenged, their collection and citation is without useful result, unless, as it seems to be thought, these numerous unsuccessful efforts to give the clause applications which fall outside its meaning show or tend to show that the clause itself has become a dead letter. Such a conclusion is, of course, inadmissible; for as we have already said, referring to the *Bradwell* case, there *are* privileges and immunities which belong to a citizen of the United States *as such;* otherwise it would be nonsense to prohibit a state from abridging them. Some of these privileges and immunities we have already pointed out; others are enumerated in the cases cited under note 5.

To these illustrations we may add another, which here is peculiarly pertinent. The business of insurance has grown to vast proportions. Insurance companies issuing policies are found in every state; and the activities of the larger companies overflow state lines and extend into every part of the country. But insurance is not commerce; and the right of a citizen to take out a policy in one state, insuring property in another where he resides, cannot be protected under the commerce clause. National protection, when appropriate, must be found in the Fourteenth Amendment. It well cannot be doubted that a citizen of the United States, residing and having property in Vermont, exercises a privilege of national citizenship when he negotiates and takes out in another state a policy insuring that property, or takes out in another state a policy insuring his life. There may be very cogent reasons, resting in the strength of the company, terms of the policy, and otherwise, making it desirable that he should do so. And it well cannot be doubted that legislation of one state denying the privilege or taxing the transaction when it occurs in another state, while leaving the transaction wholly free from taxation when it takes place in the former state, would abridge that privilege of citizenship. It would be no answer to say that thereby the former state was building up her local insurance companies and adding to the wealth of the state. Nor is it any answer to say that the citizen may resort to other clauses of the Fourteenth Amendment which will afford protection. The right of a citizen of the United States resident in one state to contract in another may be a liberty safeguarded by the due

process of law clause, and at the same time, none the less, a privilege protected by the privileges and immunities clause of the Fourteenth Amendment. In such case he may invoke either or both. This seems to be recognized in *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589-592, where the court evidently thought that under circumstances not unlike those just suggested the words "liberty" and "privilege" were interchangeable terms.

It follows from what has been said that when a citizen of the United States residing in Vermont goes into New Hampshire, he does not enter foreign territory, but passes from one field into another field of the same national domain. When he trades, buys or sells, contracts or negotiates across the state line, when he loans money, or takes out insurance in New Hampshire—whether in doing so he remains in Vermont or not—he exercises rights of national citizenship which the law of neither state can abridge without coming into conflict with the supreme authority of the federal Constitution.

The statute, as here applied, says that if a citizen resident in Vermont loan his money at 5% or less in another state, he must pay a tax upon the income; but if he loan money in Vermont at the same rate, no tax whatever shall be imposed. The power to tax income here asserted by Vermont is, in the final analysis, the power to tax so heavily as to preclude loans outside the state altogether. It reasonably is not open to doubt that the discriminatory tax here imposed abridges the privilege of a citizen of the United States to loan his money and make contracts with respect thereto in any part of the United States.

The tax on dividends, already discussed and upheld, rests in a different situation. Although dividends from outside investments are taxed, and those from state investments in terms are exempt, they are, as already appears, in substance and effect treated alike—the one by a tax falling directly upon the income of the individual stockholders, and the other falling indirectly but no less definitely upon that income, in the form of a tax which is first imposed upon the corporation as a franchise tax measured by income, but the burden of which ultimately is borne by the stockholders. The effect is the same as though the tax were imposed generally upon corporate dividends without exception or discrimination. *Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364, 369 *et seq.* The same would be true of the tax on income from loans, if it had been imposed in respect of all loans wherever made or if there had been

some form of equalizing tax which would have compensated for the burden cast upon loans made in other states. But such is not the case. Income from loans made outside the state is taxed directly, while income from loans made within the state is not taxed directly or in any indirect way so as to equalize the burden. *Woodruff* v. *Parham*, 8 Wall. 123, 140, dealt with a sales tax imposed upon all sales, whether made by a citizen of the state where the tax was imposed or a citizen of another state; and whether the goods sold were the product of the state enacting the law or of some other state. This court upheld the tax upon the ground that it did not discriminate against the products of other states or affect the privileges or immunities of their citizens; but the court clearly stated that if it had done so it would be an infringement of the provisions of the Constitution relating to those subjects. The principle of that case is applicable here and has the effect of sustaining the tax in respect of dividends and condemning the tax in respect of loans. Compare *Travis* v. *Yale & Towne Mfg. Co.*, *supra*.

Third. The statute, so far as it applies to appellant, provides that if the income taxed be derived wholly from ownership of or interest in interest-bearing securities, there shall be allowed an exemption of $800. If the income be derived from other enumerated sources, an exemption is allowed of $2000 against the "aggregate net income."

It is manifest that if the legislation had provided that where the taxpayer shall have income from both of these general sources he shall not be entitled to both exemptions, the provision would have been open to no constitutional objection. Such legislation might properly permit him, in that contingency, to select which of the exemptions he will take; or, on the other hand, might properly specify which of the two exemptions shall be accorded him. In effect, though not in terms, it is the latter alternative which the statute adopts. In terms, the statute provides that if the taxpayer receive any income other than that derived from interest-bearing securities, the personal exemption applicable to the latter class of income shall not be allowed. But the right to the $2,000 exemption allowed in respect of class A income remains unaffected. The taxpayer who receives both classes of income, while thus compelled to forego the smaller exemption, is accorded the larger one; and it is impossible reasonably to find in this situation anything arbitrary or capricious. It is true that during the taxable year in

question appellant had no net income because his gross income derived from salaries, etc., amounting to about $70,000, was entirely absorbed by allowable deductions; but this was an incident of the particular year in question and might never happen again. He failed to obtain the advantage of the exemption not because of any hostile statutory intent or hostile enforcement of the tax, but because of the collateral circumstance, peculiar, perhaps, to him alone and to the taxable year in question, that his entire gross income was absorbed by deductions, allowed by the statute as a matter of grace as is the exemption itself, so that nothing remained from which the amount of the exemption or any part of it could be subtracted.

The question of equal protection must be decided in respect of the general classification rather than by the chance incidence of the tax in particular instances or with respect to particular taxpayers. "And inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law." *Maxwell* v. *Bugbee*, 250 U. S. 525, 543. "The operation of a general rule will seldom be the same for every one. If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict." *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 102. Cf. *Packard* v. *Banton*, 264 U. S. 140, 145; *Gant* v. *Oklahoma City*, 289 U. S. 98, 102; *Storaasli* v. *Minnesota*, 283 U. S. 57, 62.

The general classification—namely, that the right to a partial exemption from a tax upon one class of income will depend upon whether the taxpayer is in receipt of income of another class with respect to which a different exemption applies—does not seem to us to be open to the objection that it is arbitrary or capricious, simply because, like any other general rule of taxation, its administration may involve incidental instances of inequality.

We conclude that the taxing act is valid in respect of the first and third points which we have discussed, but invalid in respect of the second.

Reversed and remanded for further proceedings not inconsistent with the foregoing opinion.

SUPREME COURT OF THE UNITED STATES.

No. 8.—October Term, 1935.

James C. Colgate, Appellant,
vs.
Erwin M. Harvey, Tax Commissioner of the State of Vermont.

Appeal from the Supreme Court of the State of Vermont.

[December 16, 1935.]

Mr. Justice Stone.

I think that the exemption, from the tax, of net income from money loaned within the state at not more than 5%, like the exemption of income from dividends of corporations earned within the state, does not deny equal protection or infringe any privilege or immunity of citizens of the United States, and that the judgment should be affirmed in its entirety. Unless the constitutional validity of the exemptions is to turn upon the ground that we approve laws enacted to avoid taxing the same economic interest twice, but disapprove those to encourage residents to invest their funds at home, it would seem that the considerations which have led to upholding the one exemption would not admit of condemning the other. See *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 127.

1. It is not denied that the effect of both exemptions is to place a burden on income derived from sources or investments made without the state which they do not place on income derived from like sources or investments made within it. But that affords no ground for saying that either is invalid. The equal protection clause does not forbid inequalities in state taxation. A state may select the objects to be taxed and selection, which is but the converse of exemption, involves the imposition of a tax burden on some which is not placed on others. As this Court has repeatedly held, inequalities resulting from the singling out of one particular class for taxation or exemption, regardless of the reason for the choice, or even if there is no discernible reason, are not to be pronounced invalid where there is no clear indication that the purpose or effect is a hostile or oppressive discrimination against particular persons or classes. *American Sugar Refining Co.* v. *Louisi-*

ana, 179 U. S. 89; *Board of Education* v. *Illinois*, 203 U. S. 553; *Beers* v. *Glynn*, 211 U. S. 477; *Southwestern Oil Co.* v. *Texas*, *supra*; *Quong Wing* v. *Kirkendall*, 223 U. S. 59; *Citizens Telephone Co.* v. *Fuller*, 229 U. S. 322; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 235; *Lawrence* v. *State Tax Commission*, 286 U. S. 276; *Concordia Fire Insurance Co.* v. *Illinois*, 292 U. S. 535.

The end sought by the classification is of significance in passing upon the constitutionality of the tax only insofar as it serves to show that the discrimination is not invidious. If it appears or may fairly be assumed that it is for the purpose of promoting a permissible public aim, it cannot be condemned because one class must pay a tax which another does not. Where the public interest is served one business may be left untaxed and another taxed, in order to promote the one, *American Sugar Refining Co.* v. *Louisiana*, *supra*; *Heisler* v. *Thomas Colliery Co.*, *supra*; *Aero Mayflower Transit Co.* v. *Georgia Commission*, 295 U. S. 285, or to restrict or suppress the other, *Magnano Co.* v. *Hamilton*, 292 U. S. 40; *Fox* v. *Standard Oil Co.*, 294 U. S. 87; *Quong Wing* v. *Kirkendall*, *supra*; *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304; *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, 48. But it is not necessary to go so far to support the present exemption. There is no serious contention that its purpose or effect is to suppress the lending of money without the state or to injure appellant or his fellow residents of Vermont who may prefer to invest their funds elsewhere. Nor can it be said that the exemption was not granted in furtherance of a permissible state policy, which was the legislative objective rather than an invidious discrimination against appellant and others similarly situated.

It seems to be conceded that if the statute had placed upon the tax gatherers the burden of ascertaining whether money loaned within the state is invested in property there, and had limited the exemption to money so loaned and invested, the tax would be sustained because of the benefit which would result from the increase of wealth in the state and the enlarged opportunity to obtain additional revenue. The attack is thus narrowed to the single objection that there are exempted loans, some of which, although made within the state, are or may be withdrawn and used elsewhere. It is assumed that money thus loaned and withdrawn can be of no possible benefit to the state, and it is declared that since such transactions may occur the Court cannot determine whether the

exemption will have any beneficent effect and that it is therefore invalid.

But there are benefits other than the increase of its taxable wealth which a state is at liberty to stimulate by its taxing policy, and exemptions have been sustained on the broader ground that they foster some form of domestic industry. *New York* v. *Roberts*, 171 U. S. 658; *Magnano Co.* v. *Hamilton, supra; Fox* v. *Standard Oil Co., supra; Aero Mayflower Transit Co.* v. *Georgia Commission, supra.* If Vermont chooses to encourage, by tax exemption, loans at favorable rates of interest within the state, because it believes that local interests will be benefited, it can hardly be said for that reason to be contravening a constitution that has known a protective tariff for more than one hundred years. See *Alaska Fish Co.* v. *Smith, supra*, 48; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 347. It is true that a state may not lay taxes on imports or burden interstate commerce, *Welton* v. *Missouri*, 91 U. S. 275, but it is too late for this Court to declare that a state may not favor domestic interests by granting exemptions in the exercise of its taxing power.

It is not for us to say that the Vermont legislature was unmindful of these broader advantages, or to declare that the presence within the state of investment funds offered at 5% or less to borrowers there, including those who are carrying on the business and industry of the state, is not beneficial; or that if any loans made within the state are used elsewhere they are or ever would be more than negligible in amount; or if they were that they could not have a favorable effect on interest rates within the state, which is a matter of state concern. When the Vermont legislature adopted the present exemption, it had before it the reports of two committees specially appointed to investigate the tax system of the state, which clearly indicate their judgment, based on a study of conditions in the state, that the existing system was driving investment capital from the state or into secured and non-commercial loans, and that a tax exemption embracing both secured and commercial loans would tend to increase the supply of investment capital for both and to reduce interest rates in the state.[1] This Court has no basis for saying that those committees

[1]The committee appointed in 1900 by the Governor of Vermont to investigate double taxation and to recommend measures for its relief found that the existing taxing system was driving capital from the state or into tax exempt savings banks, and suggested an exemption of loans secured by prop-

were wrong and no authority to say it. The state supreme court has stated in the present case that the legislature did have in mind these broader advantages, for it rested its decision on the ground that the exemption was made "in the interest of thrift and state development" and "for the assistance of the agricultural and industrial interests of the state."

If in the face of so much which is persuasive of the legitimate purpose and effect of this legislation, we are to declare that we cannot say whether the benefits intended either will or will not result, it does not follow that the Vermont legislature is similarly uninformed. We must assume that it is not, unless we are to discard the salutary principle of decision, that, out of a decent respect to an independent branch of the government, legislative acts must be taken to be based on facts which support their constitutional validity unless the contrary reasonably appears. This Court, it is true, has held discriminations invalid where, upon the facts disclosed by the record or within the range of judicial notice, it has felt able to say that there could be no state of facts which could rationally support them. *Royster Guano Co.* v. *Virginia*, 253 U. S. 412; *Heiner* v. *Donnan*, 285 U. S. 312; *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32; *Liggett Co.* v. *Lee*, 288 U. S. 517. But in no case has it rendered such a judgment where it has declared that it is unable to say that consequences which would justify the discrimination will not result. *Erb* v. *Morasch*, 177 U. S. 584, 586; *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 158; *Stebbins* v. *Riley*, 268 U. S. 137, 143; *Swiss Oil Corp.* v. *Shanks*, 273 U. S. 407, 413, 414; *Fort Smith Light & Traction Co.* v. *Board of Improvement Paving Dist. No. 16*, 274 U. S. 387, 391, 392; *Clarke* v. *Deckebach*, 274 U. S. 392; *Silver* v. *Silver*, 280 U. S. 117, 123; *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257, 258; *Tax Commission* v. *Jackson*, 283 U. S. 527, 537-541; *Insurance Company* v. *Glidden Co.*, 284 U. S. 151, 158; *Boston & Maine R. R.* v. *Armburg*, 285 U. S. 234, 240; *Lawrence* v. *State Tax Commission, supra*, 283; *Concordia Life Insurance Co.* v. *Illinois, supra*, 547, 548; *Metropolitan Casualty Insurance*

erty returned for taxation in the state. Double Taxation in Vermont; Report of Special Committee Appointed to Report a Measure for its Relief to the Legislature of 1900, pp. 4, 15. In 1908 a similar committee recognized the same evils but did not favor the exemption of secured loans alone, because it would increase interest rates on unsecured loans and cause a dearth of commercial credits. Vermont—Commission on Taxation—Report 1908, pp. 43 ff.

Co. of New York v. *Brownell*, 292 U. S. 620; *Fox* v. *Standard Oil Co., supra.* Unless, as we profess not to do, *Standard Oil Co.* v. *City of Marysville*, 279 U. S. 582, we are to sit as a super-legislature, or as triers of the facts on which a legislature is to say what shall and what shall not be taxed, we are not free to say that the exemption will not induce residents to offer to lend their funds within the state and at lower interest rates than they otherwise would, or that opportunities thus afforded will not be availed of by borrowers requiring funds for carrying on the commerce and industry of the state.

Even if we are to assume, in the absence of any actual knowledge, that money loaned in the state at favorable rates would not benefit it if used elsewhere, and further that in fact some money is so loaned and used, there is no discernible reason why those circumstances should be deemed to invalidate the tax and none is stated by the Court. It is irrelevant that the state, which has selected domestic loans for exemption in furtherance of a state policy, has not excluded from the exemption every transaction which conceivably might not advance its purpose. Whether the legislative object is completely achieved is of no concern to this Court, once it appears that the exemption is made for a permissible end and bears some reasonable relation to that end. Purpose or motive of the selection of the objects of taxation and exemption is material only so far as it is needful to ascertain whether the discrimination is invidious. If the choice is not condemned for that reason, it has never been held that an exemption must fail because it may benefit some who do not advance the legislative purpose. A classification for a permissible end is not to be condemned because it operates to prohibit transactions in themselves harmless, or fails to reach others which are harmful. *Powell* v. *Pennsylvania*, 127 U. S. 678; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Hebe Co.* v. *Shaw*, 248 U. S. 297; *Jacob Rupert* v. *Caffey*, 251 U. S. 264; *Miller* v. *Wilson*, 236 U. S. 373; *Hawley* v. *Walker*, 272 U. S. 718.

All taxes must of necessity be levied by general rules capable of practical administration. In drawing the line between the taxed and the untaxed the equal protection clause does not command the impossible or the impractical. Unless the line which the state draws is so wide of the mark as palpably to have no reasonable relation to the legitimate end, it is not for the judicial power to reject it and say that another must be substituted.

Citizens Telephone Co. v. *Fuller, supra,* 329; *Miller* v. *Wilson,* 236 U. S. 373, 384; *Clark* v. *Titusville,* 184 U. S. 329, 331; *Metropolis Theatre Co.* v. *Chicago,* 228 U. S. 61, 69, 70; see also *Salomon* v. *Tax Commissioner,* 278 U. S. 484; *McCray* v. *United States,* 295 U. S. 27; *Quong Wing* v. *Kirkendall, supra; Bell's Gap Rr. Co.* v. *Pennsylvania,* 104 U. S. 232, 237.

As the purpose of the exemption appears to be to encourage the lending of money within Vermont by its residents, at low rates of interest, and as it appears reasonably calculated to have that effect, and as we cannot say that such loans will not be of benefit to the state by tending to establish the interest rate at 5% or less, and by stimulating loans to borrowers for the purpose of carrying on business and industry within the state, the conclusion seems inescapable that the equal protection clause does not forbid it.

2. Feeble indeed is an attack on a statute as denying equal protection which can gain any support from the almost forgotten privileges and immunities clause of the Fourteenth Amendment. The notion that that clause could have application to any but the privileges and immunities peculiar to citizenship of the United States, as distinguished from those of citizens of states, has long since been rejected. *Slaughter House Cases,* 16 Wall. 36. It created no new privileges and immunities of United States citizenship, *Bartmeyer* v. *Iowa,* 18 Wall. 129, 133, and, as they are derived exclusively from the Constitution and laws enacted under it, the states were powerless to abridge them before the adoption of the Fourteenth Amendment as well as after. See *Crandall* v. *Nevada,* 6 Wall. 35.

Before the Amendment the privilege of passing from state to state for the purpose of approaching the seat of the national government, of transacting business with it, and of gaining access to its courts, its public offices and its ports, was declared in *Crandall* v. *Nevada, supra,* 44, to be a right of national citizenship which could be exercised independently of the will of the state. Upon this ground was placed the decision in that case that a state capitation tax on passengers transported out of the state by railroad or stage coach infringed the Constitution. No one could doubt that if the decision had been made at any time after *Railroad Company* v. *Maryland,* 21 Wall. 456, 472 (1874), and until the present moment, it would have been rested on the commerce clause. This Court has many times pointed out that movements

of persons across state boundaries are a part of interstate commerce, subject to the regulation and entitled to the protection of the national government under the commerce clause. *Caminetti* v. *United States*, 242 U. S. 470; *Hoke* v. *United States*, 227 U. S. 308; *Mayor of Vidalia* v. *McNeely*, 274 U. S. 676; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; cf. *Passenger Cases*, 7 How. 283. And it has specifically pointed out that *Crandall* v. *Nevada*, *supra*, is overruled so far as it referred the protection of such commerce to the privileges and immunities clause rather than to the commerce clause. *Helson and Randolph* v. *Kentucky*, 279 U. S. 245, 231.

The privileges and immunities clause has consistently been construed as protecting only interests, growing out of the relationship between the citizen and the national government, created by the Constitution and federal laws. *Re Hemmler*, 136 U. S. 436, 448; *McPherson* v. *Blacker*, 146 U. S. 1, 38; *Giozza* v. *Tiernan*, 148 U. S. 657, 661; *Duncan* v. *Missouri*, 152 U. S. 377, 382. Appeals to this Court to extend the clause beyond these limitations have uniformly been rejected, and even those basic privileges and immunities secured against federal infringement by the first eight amendments have been held not to be protected from state action by the privileges and immunities clause. *Walker* v. *Sauvinet*, 92 U. S. 90; *Presser* v. *Illinois*, 116 U. S. 252; *O'Neil* v. *Vermont*, 144 U. S. 323; *Maxwell* v. *Dow*, 176 U. S. 606; *Twining* v. *New Jersey*, 211 U. S. 78; cf. *Hurtado* v. *California*, 110 U. S. 516; *West* v. *Louisiana*, 194 U. S. 258. The protection and control of intercourse between the states, not carried on in pursuance of the relationship between the citizen and the national government, has been left to the interstate commerce clause, to the due process and equal protection clauses of the Fourteenth Amendment, and to Art. IV, § 2, guaranteeing to the citizens of each state the privileges and immunities of citizens in the several states. See *Williams* v. *Fears*, 179 U. S. 270. In no case since the adoption of the Fourteenth Amendment has the privileges and immunities clause been held to afford any protection to movements of persons across state lines or other form of interstate transaction.

The reason for this reluctance to enlarge the scope of the clause has been well understood since the decision of the *Slaughter House Cases*, *supra*. If its restraint upon state action were extended more than is needful to protect relationships between the citizen and the national government, and it did more than duplicate the protection

of liberty and property secured to persons and citizens by the other provisions of the Constitution, it would enlarge judicial control of state action and multiply restrictions upon it to an extent difficult to define, but sufficient to cause serious apprehension for the rightful independence of local government. That was the issue fought out in the *Slaughter House Cases, supra,* with the decision against the enlargement. Since the adoption of the Fourteenth Amendment at least forty-four cases[2] have been brought to this Court in which state statutes have been assailed as infringements of the privileges and immunities clause. Until today none has held that state legislation infringed that clause.

If its sweep were now to be broadened to include protection of every transaction across state lines, regardless of its connection with any relationship between the citizen and the national government, a step would be taken, the gravity of which might well give us concern. But it is necessary to go much further before the present tax can be condemned. If protection of the freedom of the citizen to pass from state to state were the object of our solicitude, that privilege is adequately protected by the commerce clause, even though the purpose of his going be to effect insurance or transact any other kind of business which is in itself not commerce. But protection of the citizen's freedom of movement, whether by the privileges and immunities clause or by the commerce clause, will afford appellant no relief from the present tax. The record does

[2] Slaughter House Cases, 16 Wall. 36; Bradwell *v.* State, 16 Wall. 130; Bartemeyer *v.* Iowa, 18 Wall. 129; Minor *v.* Happersett, 21 Wall. 162; Walker *v.* Sauvinet, 92 U. S. 90; Kirtland *v.* Hotchkiss, 100 U. S. 491; Presser *v.* Illinois, 116 U. S. 252; Mahon *v.* Justice, 127 U. S. 700; In re Kemmler, 136 U. S. 436; Crowley *v.* Christensen, 137 U. S. 86; McElvaine *v.* Brush, 142 U. S. 155; McPherson *v.* Blacker, 146 U. S. 1; Giozza *v.* Tiernan, 148 U. S. 657; Duncan *v.* Missouri, 152 U. S. 377; Miller *v.* Texas, 153 U. S. 535; Ex parte Lockwood, 154 U. S. 116; Iowa Central Ry. *v.* Iowa, 160 U. S. 389; Plessy *v.* Ferguson, 163 U. S. 537; Orient Insurance Co. *v.* Daggs, 172 U. S. 557; Cumming *v.* Board of Education, 175 U. S. 528; Maxwell *v.* Dow, 176 U. S. 581; Williams *v.* Fears, 179 U. S. 270; Orr *v.* Gilman, 183 U. S. 278; Cox *v.* Texas, 202 U. S. 446; Board of Education *v.* Illinois, 203 U. S. 553; Ballard *v.* Hunter, 204 U. S. 241; Western Turf Ass'n *v.* Greenberg, 204 U. S. 359; Halter *v.* Nebraska, 205 U. S. 34; Wilmington Star Mining Co. *v.* Fulton, 205 U. S. 60, 73; Twining *v.* New Jersey, 211 U. S. 78; Western Union *v.* Com'l Mill Co., 218 U. S. 406; Mo. Pacific Ry. Co. *v.* Castle, 224 U. S. 541; Graham *v.* West Virginia, 224 U. S. 616; Selover, Bates & Co. *v.* Walsh, 226 U. S. 112; Rosenthal *v.* New York, 226 U. S. 260; Waugh *v.* Board of Trustees, 237 U. S. 589; Porter *v.* Wilson, 239 U. S. 170; Crane *v.* Campbell, 245 U. S. 304; Armour & Co. *v.* Virginia, 246 U. S. 1; Omaechevarria *v.* Idaho, 246 U. S. 343; Maxwell *v.* Bugbee, 250 U. S. 525; Ownby *v.* Morgan, 256 U. S. 94; Prudential Ins. Co. *v.* Cheek, 259 U. S. 530; Hamilton *v.* Regents, 293 U. S. 245.

not show that he was ever outside the State of Vermont and for aught that appears he acquired his extra-state investments, which are in the form of negotiable corporate securities, by gift or purchase in Vermont. Nor does it appear that the physical securities or payments of income of which appellant has had the benefit have crossed state lines. He can be saved from the tax only by the extension of the immunity to his income merely because the property from which it has been derived, or the corporation paying it, is located in another state.

Such is the contention now made: that the privilege of acquiring, owning and receiving income from investments without the state is a privilege of federal citizenship. And the suggestion is that the privilege is infringed by taxing this income just as the commerce clause is infringed by state taxation burdening the privilege of carrying on commerce across state lines. In any case the privileges and immunities clause is said to be infringed by taxing this income at a different rate than income from investments made within the state.

The novel application thus given to the clause, and the arguments used to support it, leave one in doubt whether it is thought to preclude all differences of taxation of the two classes of income, or only to forbid such inequality as is in some sense arbitrary and unreasonable. If the former, the clause becomes an inexhaustible source of immunities, incalculable in their benefit to taxpayers and in their harm to local government, by imposing on the states the heavy burden of an exact equality of taxation wherever transactions across state lines may be involved. If the latter, it would seem to add nothing to the guarantee of the equal protection clause, which extends to all "persons", including citizens of the United States. In that case discourse upon the privileges and immunities clause would appear to be a gratuitous labor of supererogation.

If the privilege of making investments without the state is one protected by the privileges and immunities clause and a tax upon the income derived from them is analogous to a tax upon the privilege of carrying on interstate commerce, we must not only accept the view that the privilege is infringed by the present tax, but it would follow that any taxation of the income is forbidden. The answer is, of course, that a state tax on net income derived from interstate commerce has never been regarded as a burden on commerce or as an infringement of the commerce clause. See *United States Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321; *Shaffer* v. *Carter*, 252 U. S. 37; cf. *Peck & Co.* v. *Lowe*, 247 U. S. 165; *Wagner* v. *City*

of Covington, 251 U. S. 95. Far less could it be thought that a tax on property, or income from it, is an interference with commerce because the property had at some time been or might some time become the subject of such commerce. Cf. *Heisley* v. *Thomas Colliery Co.*, *supra*. In applying the privileges and immunities clause, as now interpreted, no ground is suggested, or well could be, for regarding a tax on income from investments without the state as infringing the privilege of carrying on interstate transactions, any more than a tax on net income derived from interstate commerce or from property which had at some time moved in interstate commerce infringes the commerce clause.

The contention that a state tax indirectly affecting transactions carried on across state lines, not forbidden by the commerce clause or by Art. IV, § 2, can be condemned under the privileges and immunities clause, was definitely rejected by this Court in *Williams* v. *Fears*, *supra*. There a state occupation tax upon those engaged in hiring laborers for employment outside the state was held not to infringe the privileges and immunities clause or the equal protection clause.

So far as the objection is addressed to bare inequality of taxation affecting interstate transactions, if valid, it must be accepted as compelling equality of taxation by the state of the citizen's residence and as well by the state into which the transaction extends. More than this, since the exercise of the privilege involves both states, it would seem to be infringed not only by an unequal tax imposed by either, but by any tax imposed at the normal rate by both.

Starting with the dubious assumption that the protection of every movement of the citizen interstate, an acknowledged subject of the commerce clause, is independently a subject of the privileges and immunities clause, the protection afforded by the latter is expanded until it affords a refuge to the citizen from taxation which has no necessary relation to his movements interstate and is in fact not shown to impose any restraint upon them. A tax immunity created avowedly for the protection of the citizen's privilege of movement from state to state is thus pressed far beyond the requirements of the interest put forward to justify it, and to a point which has never been thought needful or even desirable for the protection of the commerce of the nation. It is a transition effected only by ignoring the decision of this Court in *Williams* v. *Fears*, *supra*.

If mere difference in taxation is made the test of infringement, the iron rule of equality of taxation which the equal protection and due process clauses have failed to impose, see *Bell's Gap Rr. Co.* v. *Pennsylvania, supra*, 237, is the first fruit of this expansion of the protection of the privileges and immunities clause. To gain the benefits of its shelter the citizen has only to acquire, by a transaction wholly intrastate, an investment outside his state. I can find in the language and history of the privileges and immunities clause no warrant for such a restriction upon local government and policy. Citizens of the United States are given no privilege not to pay taxes. It would seem that a subordination of state taxing power to the interests of the individual, of such debatable wisdom, could be justified only by a pointed command of the Constitution of plain import.

If we turn from the reasoning by which this application of the privileges and immunities clause to state taxation is supported to the decision now actually made, it seems that the clause is thought to prohibit only those inequalities in taxation which are considered to be arbitrary and unreasonable. The exemption of dividends derived from corporate business carried on within the state, and the taxation of similar dividends from without the state, is held not to be an infringement of the clause. Exemption of income from investments in property within the state and taxation of like income from without the state is thought to be valid. But the privileges and immunities clause, it is declared, forbids any difference in the taxation of income from investment made within the state and income from investment made without, a conclusion which can only be attributed to the belief that this discrimination, as distinguished from the others, is arbitrary and unreasonable.

We are thus returned to the point of beginning, to a discussion of the question whether the exemption in the present tax is so unreasonable, so without support of a permissible state policy, as to infringe constitutional limitations. If the exemption does not merit condemnation as a denial of the equal protection which the Fourteenth Amendment extends to every person, nothing can be added to the vehemence or effectiveness of the denunciation by invoking the command of the privileges and immunities clause.

The judgment should be affirmed.

Mr. Justice BRANDEIS and Mr. Justice CARDOZO concur in this opinion.